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No. .

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In The
Supreme Court of the United States
October Term, 1988

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JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a union's duty of fair representation in processing a grievance that arose during the term of a grievant's employment vanishes simply because the grievant terminates his employment; and whether, despite a subsequent settlement of that grievance, the grievant may maintain an individual suit against the employer for breach of the collective bargaining agreement?

2. Whether the Court of Appeals, in determining the applicable limitations period, properly applied this Court's decisions in *DelCostello v. Teamsters* and *United Parcel Service v. Mitchell* by analogizing Respondents' challenge of a grievance settlement to an action for breach of contract and consequently applying a five-year period?

LIST OF PARTIES

The parties to the proceedings below and in this Court are Petitioner Jewel Food Stores, a division of Jewel Companies, Inc.; Respondents Kelly Merk, Joseph Staszewski, Vickie Menagh, Donna McCormick, David Therkield, John Malone, Marlene Wagner, Michael DeMare, Wayne Volker, Eleanore Collins, Andrew Kachik, and Patricia Todd (all of whom purport to represent an uncertified class of certain union employees who left Jewel's employment during a specified period, estimated to be about two thousand individuals); and Respondent United Food and Commercial Workers International Union, AFL-CIO, Local 881.

RULE 28.1 LISTING

American Stores Company is the parent corporation of Petitioner Jewel Food Stores, a division of Jewel Companies, Inc.

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UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jewel Food Stores, a Division of Jewel Companies, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals ("the Court of Appeals") is reported at 848 F.2d 761 (7th Cir. 1988) (Appendix A, *infra*, pp. A-1 to A-13). The denial of Petitioner's Motion for Rehear-

ing by the Court of Appeals is set forth in Appendix B hereto (*infra., p. B-1*). *The opinion of the district court (Aspen, D.J.)* ("the District Court") is reported at 641 F. Supp. 1024 (N.D. Ill. 1986) (Appendix C, *infra.*, pp. C-1 to C-26).

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1988. On June 27, 1988, the Court of Appeals denied Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

This case involves the following federal and state statutes: Sections 203(d) and 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 173(d), 185(a) (1982); Sections 9(a) and 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 159(a), 160(b) (1982); Section 12(b) of the Illinois Uniform Arbitration Act, ILL. REV. STAT. ch. 10, § 112 (1982); and Section 13-205 of the Illinois Code of Civil Procedure, ILL. REV. STAT. ch. 110 § 13-205 (1987). The texts of these statutes are set forth in Appendix D (*infra*, pp. D-1 to D-3).

STATEMENT

Summary of Statement.

This case involves a familiar situation. A claim common to all employees in the bargaining unit arose under a labor contract, and the incumbent union filed a grievance under the exclusive and mandatory grievance and arbitration provision contained in that contract. While that grievance was pending, the employment of some of the employees terminated, but the union continued to represent them in the settlement discussions concerning the dispute. No one ever protested or

disavowed that representation. Ultimately, an agreement was reached between the union and the employer, which restricted the settlement proceeds to those employed on the date the agreement was ratified by the union members still employed. That settlement also foreclosed any further litigation of the claim. This settlement was approved by the NLRB, which dismissed the charge the union had filed and which later dismissed charges filed against the union and the employer by one who did not receive any of the proceeds because he was not employed on the ratification date.

Nonetheless, the courts below held that this settlement did not bind the former employees because the union lacked authority to represent them after they left the bargaining unit. Hence, the courts below reasoned that the union had no duty to represent them and no duty to do so fairly. Accordingly, the courts below held that, notwithstanding the settlement, the former workers could sue the employer directly for breach of the labor contract under Section 301, even though the contractual dispute arose while those same former workers were employed by the employer and represented by the union.

The Statement.

Respondents are former employees of Jewel Food Stores, a division of Jewel Companies, Inc. ("Jewel"), whose employment terminated sometime between February 26, 1984, when a contractual dispute arose regarding the employer's right to reduce employee wages, and June 21, 1985, when that dispute was settled by the United Food and Commercial Workers International Union, Local 881 ("the Union") and Jewel. During Respondents' employment with Jewel, the Union served as their exclusive bargaining agent, and the terms and conditions of their employment were governed by collective bargaining agreements between Jewel and the Union.

Respondents claim that Jewel improperly reduced employee wages on February 26, 1984. They base their claims

on the collective bargaining agreement in effect from September 19, 1982, through June 15, 1985 ("the 1982 agreement"). That agreement established an exclusive and mandatory grievance and arbitration procedure, under which "any dispute involving the interpretation or application of the provisions of the Contract" was, by definition, a grievance. Only Jewel and the Union were entitled to invoke the arbitration provision. The contract specifically provided that awards thereunder "shall be final and binding upon the complaining employee or employees, if any." (See Appendix E *infra*, pp. E-1 to E-4)

Jewel reduced employee wage rates on February 26, 1984, under a claim of right.[1] The Union disagreed and filed a written grievance under the 1982 agreement; it also filed suit in federal district court ("the Union suit") and unfair labor practice charges before the National Labor Relations Board ("NLRB").[2] Jewel filed a counterclaim against Local 881, a third party complaint against the International Union, and charges with the NLRB.[3]

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[1] Jewel claimed that an oral agreement with UFCW Local 881 authorized Jewel to terminate and reopen for renegotiation the economic terms of the 1982 collective bargaining agreement if certain lower-wage warehouse-type stores opened in Jewel's market. When that contingency occurred, Jewel reopened the contract, and negotiations followed for weeks without any objection by the Union, until a bargaining impasse developed.

[2] On February 16, 1984, Jewel informed the Union that it would implement its final offer on February 26, 1984. The Union filed its written grievance on February 17, 1984, and its lawsuit on February 23, 1984, all before the effective date of the wage reduction. No time elapsed between the alleged contractual breach and the Union's grievance thereof, so no employees affected by the reduction could have left Jewel's employment prior to the filing of the grievance.

[3] Jewel claimed that the exercise of its right to reopen, and to modify the contractual wage rates after good faith bargaining resulted in impasse, was not substantively arbitrable under the

(Footnote continued on the following page)

After months of negotiations regarding all affected employees, including Respondents, in June of 1985 the parties agreed to settle the grievance and to dismiss all outstanding litigation. Under this settlement, Jewel agreed to make certain lump payments, in amounts less than those originally claimed by the Union, to all employees on the payroll as of the ratification date. Contemporaneously, the parties also entered into a new collective bargaining agreement ("the 1985 agreement"). Both the settlement and the 1985 agreement were overwhelmingly ratified by the Union's membership. The Union thereupon withdrew its request for arbitration. The NLRB, after carefully scrutinizing the settlement to ensure that it effectuated the purposes of the NLRA with respect to the employees affected, including Respondents, approved the settlement and dismissed the Union's unfair labor practice charge against Jewel.

Thereafter, two separate charges were filed by a former employee and a member of the Respondents' proposed class — one challenging the settlement itself and another claiming that the Union did not fairly represent former employees in negotiating it. They were both dismissed by the NLRB's Regional Director.

On September 10, 1985, Respondents filed a hybrid suit under Section 301 of the LMRA, 29 U.S.C. § 185(a) (1982) ("Section 301") against Jewel and the Union; Count I claimed that Jewel's wage reduction had violated the applicable collective

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(Continued)

[8] terms of the oral reopener agreement, or under the terms of the written contract which prohibited interest arbitration of wage rates. Such an issue was for a court to decide, and a district court ultimately rejected Jewel's position on arbitrability. That position, however, was a logical outgrowth of Jewel's basic legal contentions and was not calculated in any way to diminish the role of the contractual dispute resolution process, in its proper sphere. Indeed, Jewel and the Union have adopted and utilized comprehensive grievance and arbitration procedures for many years.

bargaining agreement, and Count II claimed that the Union had breached its duty of fair representation in settling the contractual grievance that had challenged the wage reduction.

The Union moved for summary judgment, arguing, in part, that it owed no duty to represent Respondents fairly in settling the grievance because Respondents, although employed by Jewel when the contractual dispute arose, were not so employed when it was settled. Respondents then amended their complaint adding, as Count I, a direct breach-of-contract claim under Section 301 against Jewel, and relegating their hybrid Section 301 claim to Counts II and III. Count I of Respondents' Amended Complaint alleged that the settlement of the grievance filed on their behalf was not final and binding on them because the Union was not "the bargaining agent of Plaintiffs." Consequently, Respondents alleged, any agreement between the parties to the labor contract "neither altered nor limited the individual rights of Plaintiffs to pursue independent actions against Defendant Jewel for breach of the collective bargaining agreement."

On June 26, 1986, the District Court granted the Union's Motion for Summary Judgment as to Counts II and III, holding that the Union owed no duty to Respondents after they terminated their employment because, "[w]hether or not they remained 'employees' under § 2(3) of the NLRA, they were no more proper members of the bargaining unit once they left Jewel than were the retirees in *Allied [Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).]." *Merk*, 641 F. Supp. at 1029. Concluding that Jewel's settlement with the Union was not final and binding with respect to Respondents, the District Court denied Jewel's Motion to Dismiss Count I.

The District Court also rejected Jewel's contention that the appropriate statute of limitations for Count I was either the Illinois' ninety-day period for vacating arbitration awards that were not pursuant to collective bargaining agreements,

or the six-month period embodied in Section 10(b) of the NLRA for filing unfair labor practice charges. That court then held that the most analogous state statute of limitations for Respondents' case was the five-year Illinois statute of limitations for breach of an oral contract, under ILL. REV. STAT. ch. 110 § 13-205 (1987).

On August 13, 1986, the District Court denied Jewel's Motion for Reconsideration, but granted Jewel's Motion to Certify that court's prior order for an interlocutory appeal pursuant to 28 U.S.C.§ 1292(b) (1982). On September 29, 1986, the Court of Appeals granted Jewel's Petition for Permission to Appeal.

On May 31, 1988, the Court of Appeals affirmed the District Court's Order, holding that (1) the Union had no duty to represent former employees at all because they were not statutory employees under the NLRA, and thus the Union could not have compromised their claims by the settlement with Jewel (*Merk*, 848 F.2d at 766);[4] and (2) the District Court

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[4] That opinion casually noted that if the Union had a duty of fair representation it "did not fulfill" it. *Merk*, 848 F.2d at 767. Clearly, this offhand observation could not resolve the fulfillment question because it had not been adequately addressed by the District Court; that court had noted only that, in its view, the duty could not be imposed because otherwise the Union would have had "a duty to achieve the impossible" (648 F. Supp. at 1028-29), a view that the Court of Appeals expressly rejected (848 F.2d at 764-65). Nevertheless, Petitioner notes that this conclusion conflicts with longstanding Seventh Circuit precedents requiring deliberately discriminatory or hostile misconduct by the Union as a predicate for finding a breach of the duty of fair representation. *See, e.g., Hoffman v. Lonza*, 658 F.2d 519, 522 (7th Cir. 1981). The conclusion that the duty was not fulfilled also conflicts with *Steelworkers Local Union No. 2869*, 239 NLRB 982 (1978), where the NLRB found no breach in a similar situation (settlement proceeds distributed only to employees employed on the ratification date), and with *Larson v. Transit Authority*, 219 Neb. 539, 364 N.W.2d 33 (1985) (A union did not fail to represent former employees in good faith when it negotiated a renewal agreement which settled a dispute under a prior agreement by cash payments to only those workers employed on the settlement date).

properly rejected Jewel's proposed limitations periods and properly concluded that Respondents' Section 301 action against Jewel was timely. In support of this conclusion the Court of Appeals cited only *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1988), and did not decide whether "five years or some other period is best." *Merk*, 848 F.2d at 762 n.2.

Jewel filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on June 27, 1988. The Court of Appeals denied Jewel's motion for a stay of its mandate on July 7, 1988. The mandate issued on July 20, 1988, and this Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS' SWEEPING DECISION THAT A UNION DOES NOT OWE A DUTY OF FAIR REPRESENTATION TO FORMER EMPLOYEES AND DOES NOT BIND THEM BY A GRIEVANCE SETTLEMENT CONTRAVENES THIS COURT'S SETTLED DOCTRINE AND THREATENS TO DESTABILIZE LABOR RELATIONS

The holding of the Court of Appeals violates two fundamental principles of federal labor policy, namely, the exclusivity of representation by the incumbent union, and the finality, in general, of resolutions by that exclusive agent and the employer. Furthermore, that holding directly conflicts with this Court's established precedents, which have developed and safeguarded those principles.

A. THE HOLDING BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *REPUBLIC STEEL v. MADDOX* AND *VACA v. SIPES*

Under Section 9(a) of the NLRA, an incumbent union is the employees' exclusive representative for both negotiating

and administering a collective bargaining agreement, *Humphrey v. Moore*, 375 U.S. 335, 342 (1942); 29 U.S.C. § 159(a) (1982). The representative is entitled to negotiate an exclusive grievance and arbitration procedure granting it plenary authority to process contractual grievances and binding all employees covered by its terms. *Hotel & Restaurant Employees Union v. Michelson's Food Services, Inc.*, 545 F.2d 1248, 1251 (9th Cir. 1976). *See also Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967). The corollary of a union's authority is its duty of fair representation. *Bowen v. United States Postal Service*, 459 U.S. 212, 225 n.14 (1983); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).

The union's authority over contractual grievances, and its correlative duty of fair representation, continues even with respect to employees who leave the bargaining unit. These interrelated propositions are made clear by this Court's decisions in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-653 (1965) and *Vaca*, 386 U.S. at 186. In *Republic Steel*, a former employee brought a suit for breach of a labor agreement that allegedly occurred after his employment ended. This Court dismissed his suit, holding that he was required to exhaust the contractual grievance and arbitration procedure administered by the union. Thereafter, *Vaca* made it clear that the union was subject to a duty of fair representation in administering such a procedure.

The Union here agreed to an exclusive dispute resolution mechanism under which it had the sole authority to invoke arbitration on behalf of employees. Thus, the Union effectively "stripped [Respondents] of [their] traditional forms of redress" for breaches of the collective bargaining agreement, *Vaca*, 386 U.S. at 182, 184-86, and thereby incurred a duty of fair representation toward Respondents — a duty that continued even after their employment ended. *Id. See also Republic Steel*, 379 U.S. at 652-53. The Court of Appeals' decision below cannot be reconciled with those two holdings of this Court; it severs the inextricable connection between a union's status

as exclusive representative and its correlative duty of fair representation — a connection recognized by this Court.

In *Republic Steel*, this Court reasoned that a former employee's claim for contractual benefits is not "critically unlike other types of grievances." *Id.* at 656. Accordingly, such contractual claims are subject to the "general rule" that grievants must resort to the "contract grievance procedure agreed upon by the employer and the union as the mode of redress." *Id.* at 652. This Court applied that rule to former employees, requiring them to look to the union as their exclusive representative in processing their grievances. *Id.*

In *Vaca*, this Court relied on *Republic Steel* for the proposition that a grievant must exhaust his contractual remedies because he is "bound by the terms of [the] agreement which govern the manner in which contractual rights must be enforced." *Id.* at 184. This Court held that where a union has the sole power to invoke the higher stages of the grievance procedure, as the Union did in this case, it also has a duty of fair representation in handling grievances. *Id.* at 185-86. Regardless of whether the grievant is a current or a former employee, this rationale is manifestly applicable whenever a collective bargaining agreement lodges in a union the exclusive authority to process grievances.

These two cases reflect this Court's recognition of the Congressional objective expressed in Section 203(d) of the Labor-Management Relations Act, favoring "[f]inal adjustment by a method agreed upon by the parties . . . for settlement of grievance disputes over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C.§ 173(d) (1982). That Congressional objective, of course, has been advanced by the grievance and arbitration provisions contained in most collective bargaining agreements, which preclude the parties from resorting to litigation or economic self-help. Indeed, that objective is the cornerstone of American labor-management relations, as reflected in this Court's expressed

policy favoring resolution by settlement or by the machinery devised by the parties to a labor contract. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581 (1960). It is that policy that was wholly disregarded by the courts below.

The Court of Appeals ruled that employees, such as Respondents, who leave their employment in the unit, no longer are subject to the authority of the exclusive representative with respect to any pending contractual disputes. Under that view, each such worker suddenly becomes a separate party to a dispute even though the dispute arose under a labor contract negotiated and administered by the Union — a separate party whom the Union does not represent, but with whom the employer must deal in order fully and finally to resolve such disputes. It was precisely such destabilizing results which this Court held, in *Republic Steel*, could not be countenanced. Such results are incompatible with the central importance accorded to the parties' dispute-settling mechanisms by this Court's decision in the "Steelworker's Trilogy" *(United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960)), and reaffirmed in *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986).

The courts below reached an erroneous result because, we submit, they asked the wrong question. The question is not whether Respondents were, at the time of the settlement, "statutory employees." Rather, the question is whether their grievance was subject to the exclusive grievance and arbitration procedure of the governing collective bargaining agreement. If the grievance arose under the contract, as it plainly did, then it must be governed by the contractual enforcement procedures.

In *Pennsylvania Railroad Company v. Day*, 360 U.S. 548 (1958), this Court adopted the foregoing analysis in dealing with a

similar situation under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982). There, the plaintiff retired and then brought suit directly against his former employer for additional compensation allegedly due under the labor agreement. This Court concluded that the National Railroad Adjustment Board had exclusive primary jurisdiction under that Act, reasoning first that "[t]here is nothing in the Act which requires that the employment relationship subsist throughout the entire process of administrative settlement" — even though the definition of "employee" under the Act was limited to "every person in the service of a carrier. . . ." *Day*, 360 U.S. at 551-52. Second, allowing a former employee to bypass the procedure established for resolving grievances had no particular advantages, and involved the risk of unrest and instability generated by inconsistent dispositions of the same underlying claims.

> All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. A contrary conclusion would create a not insubstantial class of preferred claimants. Retired employees would be allowed to bypass the Board specially constituted for hearing railroad disputes whenever they deemed it advantageous to do so, whereas all other employees would be required to present their claims to the Board.
>
> * * * *
>
> Since nothing is a greater spur to conflicts, and eventually conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act.

Day, 360 U.S. at 552-53 (footnote omitted).

The NLRA, unlike the Railway Labor Act, encourages, rather than prescribes, the use of grievance-arbitration machinery for the resolution of claims arising under a collective bargaining agreement. Nonetheless, judicial interpretation of both Acts reflects similar recognition of, and deference to, the central role of arbitration in dispute settlement. *See Hill v. Norfolk & Western Railway*, 814 F.2d 1192, 1195 (7th Cir. 1987).

The adverse consequences recognized by this Court under the Railway Labor Act are equally applicable under the NLRA in the event former employees are allowed to "opt-out" of a union's handling of a pending grievance under the contractual machinery in order to seek relief on their own.

Indeed, the Court of Appeals itself referred to certain unfortunate effects of its decision, which it described as "unsettling." This characterization manifestly understates the destructive effect of its holding on contractual dispute resolution procedures designed to preserve harmonious labor relations by informed, prompt, economic and uniform resolutions by arbitrators, or by the parties themselves in pre-arbitration settlements.

The decisions below endanger the certainty and stability that foster labor peace. Under those decisions, the parties to a labor contract can no longer rely upon the finality of their own compromises with respect to workers who have left the bargaining unit — no matter how fair and reasonable. Such consequences are wholly incompatible with this Court's recognition that such reliance is essential to an effective dispute-settling machinery.

> By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes a corresponding duty to discharge that responsibility faithfully — a duty which it owes to the employees whom it represents and on which the

> employer with whom it bargains may rely. When the union, as the exclusive agent of the employee, waives arbitration or fails to seek review of an adverse decision, the employer should be in substantially the same position as if the employee had had the right to act on his own behalf and had done so. Indeed, if the employer could not rely on the union's decision, the grievance procedure would not provide the "uniform and exclusive method for [the] orderly settlement of employee grievances," which the Court has recognized is essential to the national labor policy.

Bowen, 459 U.S. at 226 (footnote omitted).

Petitioner's situation is not unusual. Each time a union and an employer have a dispute over the application and interpretation of a collective bargaining agreement, and the dispute is not immediately resolved, the rights of former employees may be at issue. If negotiations are protracted, the number of former employees involved may be substantial.

The Court of Appeals recognized that "the proliferation of persons with authority to bargain on their own [as a result of its decision] will raise the cost of bringing the dispute to a conclusion . . . and the prospect of some ex-employees' suing and winning may make a union leery of compromising the claims of current employees." *Merk*, 848 F.2d at 767. Obviously, the employer might also be "leery" of putting its best offer forward if the settlement will not be a final disposition.

The resultant difficulties are, of course, not limited to settlements. An arbitration award would presumably be no more final and binding on ex-employees, such as Respondents, than a settlement with the employer. If the union has no obligation and no duty to represent such grievants fairly, then any such grievant could try to get more in court.

The courts below were presumably seeking to protect former employees, but their decisions may be harmful to them.

Since unions would no longer have a legal obligation to represent such employees, unions will be less likely to do so. Many such grievants would be unwilling or unable to incur the expenses of pursuing their own claims, and consequently might abandon them. The remaining employees may also suffer; the uncertainty in the course of the negotiations regarding precisely whom the union does and does not represent may preclude any settlement at all.

Finally, the decision below unfortunately casts a legal shadow on established dispute-settling practices in labor-management relations. For example, in negotiating renewal agreements, the parties frequently agree to an increase in pay, retroactive to the expiration of the prior agreement. Typically such agreements restrict that pay only to those working at the time of the settlement, thereby excluding former employees. *See, e.g., Larson v. Transit Authority*, 219 Neb. at 541, 364 N.W.2d at 36. Indeed, this has been the consistent practice of Jewel and the Union herein. Such retroactive adjustment, restricted to present employees, is essentially similar to the settlement reached in this case; thus, the legitimacy of such key devices routinely employed by labor practitioners as a means of avoiding a strike and preserving labor peace is now in question.

In short, the holding below not only fails to serve the interests of any group involved in the labor relations equation, but also violates the principles embodied in this Court's decisions in *Republic Steel* and *Vaca*.

B. THE COURT BELOW ACCEPTED THE UNSETTLING CONSEQUENCES OF ITS DECISION BECAUSE IT SERIOUSLY MISCONCEIVED THIS COURT'S DECISION IN *ALLIED CHEMICAL v. PITTSBURGH PLATE GLASS*

The decisions below, and the arguments of the other parties to this litigation, rested on the applicability of *Allied*

Chemical v. Pittsburgh Plate Glass, 404 U.S. 157 (1971), to this case. Indeed, the Court of Appeals announced that "a union need not represent non-employees. *Pittsburgh Plate Glass* establishes this". *Merk*, 848 F.2d at 766. This unqualified proposition is simply not true. Indeed, this Court expressly declared that its reasoning and holding in *Pittsburgh Plate Glass* was not to be applicable to former employees, such as Respondents.[5]

In *Pittsburgh Plate Glass*, this Court held that retirees "are not 'employees' within the meaning of the collective-bargaining obligations of the [NLRA]", and could not be included in the bargaining unit because it "would disrupt the processes of collective bargaining." *Pittsburgh Plate Glass*, 404 U.S. at 172, 173. Accordingly, retirees' benefits established before their retirement were not a mandatory subject of collective bargaining because retirees do not fall "within the ambit of the *collective bargaining obligations* of the [NLRA]." *Id.* at 166 (emphasis added).

This Court, however, expressly distinguished employees who have "quit or whose employers had gone out of business", reasoning that, unlike retirees, such persons "were members

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[5] The Court of Appeals stated that: "Although the statute does not in terms exclude workers who have retired, quit, or been fired, the parties have followed the implication of *Pittsburgh Plate Glass* in treating § 2(3) as if it did. . . Again, we follow the parties' lead in assuming that the 2,000 former workers are not statutory "employees" — without deciding whether this question would have a different answer had the parties chosen a different litigating strategy." *Merk*, 848 F.2d at 765. Petitioner respectfully submits that it made no such assumption; rather, it consistently argued that that question need never be reached because Respondents' claims were based on events that had occurred during their employment relationship and that were governed by the labor contract and its enforcement procedures. (In the Court of Appeals, see Brief of Defendant-Appellant Jewel, pp. 8, 20; Reply Brief of Defendant-Appellant Jewel, pp. 2-5, n. 2 and p.11; in the District Court, see Jewel's Memorandum in Support of its Motion to Dismiss Count I, pp. 7-8; Jewel's Reply Memorandum for its Motion to Dismiss Count I, pp. 3-7; Jewel's Motion for Reconsideration, pp. 12-13).

of the work force available for hire and at least in that sense could be identified as 'employees.' " *Id.* at 168. Moreover, this Court observed that the Board had characterized such persons to be " 'employees' embraced by the policies of the [NLRA]." *Id.* (quoting *Pittsburgh Plate Glass Co.*, 177 NLRB 402 (1970)). *See also Goodman Lumber Co.*, 166 NLRB 304, 305 (1967); *Chemrock Corp.*, 151 NLRB 1074, 1076 (1965).

Accordingly, it is clear that *Pittsburgh Plate Glass* does not support the approach of the court below. That court not only misconceived the thrust of that case but also ignored the lesson of this Court's decisions in *Republic Steel* and *Day*, namely, that a union does not lose its status as the exclusive statutory representative of those who leave their employment with respect to contractual grievances (whether same arose during or after their employment).

C. THE UNION, HAVING UNDERTAKEN TO REPRESENT RESPONDENTS, OWED THEM A DUTY TO DO SO FAIRLY AND A CONTRARY HOLDING IS INCOMPATIBLE WITH THE APPROACH OF THIS COURT AND AT LEAST ONE ANOTHER CIRCUIT

After Respondents' employment with Jewel terminated, the Union continued to represent them, without objection from any Respondent, until the date of the settlement. Assuming arguendo that the Union was legally not required to do so, by continuing that representation the Union was "bound by its duty of fair representation to fully and fairly advocate [their] claim." *Kesner v. N.L.R.B.*, 532 F.2d 1169, 1175 (7th Cir.), *cert. denied*, 429 U.S. 1022 (1976).

However, the Court of Appeals has suggested that Respondents would not be bound by the settlement of the grievance unless they had expressly consented to this con-

tinuing representation. *Merk*, 848 F.2d at 766.[6] This suggestion is unacceptable for two reasons. First, it makes a union's authority contingent on the individual employee's decision, thereby endangering uniform administration of the labor contract. Second, this suggestion directly contradicts this Court's decision in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 327 U.S. 661 (1946) (*Elgin II*).

Elgin II arose under the Railway Labor Act, when a group of individual employees challenged their union's exclusive authority to settle a "minor dispute" with their employer. Under that Act, an individual grievant is entitled to process his grievance even though the union had decided to abandon it. In its first ruling, this Court concluded that the mere fact that the union purported to act on the employees' behalf was not enough, alone, to uphold the settlement. *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 748-49 (1945) (*Elgin I*). But, upon rehearing, this Court held that:

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[6] That court also stated that: "[T]he parties have not discussed whether the former employees assented to representation by the Union — in the collective bargaining agreement or by acquiescing in the Union's pursuit of their rights through arbitration — or have exhausted their internal remedies. We do not speculate on the implications of such an approach for future litigation." *Merk*, 848 F.2d at 766. Petitioner respectfully submits, however, that it asserted Respondents' implied assent by submitting the following arguments: 1) Under this Court's holding in *Republic Steel*, Respondents were not excused from exhausting their internal remedies; and 2) Respondents are bound by the settlement because the Union served as Respondents' exclusive representative, without objection, throughout settlement negotiations. (In the Court of Appeals, see Brief of Defendant-Appellant Jewel, pp. 9-10, 20-27; Reply Brief of Defendant-Appellant Jewel, pp. 6-9. In the District Court, see Jewel's Memorandum in Support of its Motion to Dismiss Count I, p. 8; Jewel's Reply Brief in Support of its Motion to Dismiss Count I, p. 6; and Jewel's Motion for Reconsideration, pp. 13-14 and 21.)

> It would be entirely inconsistent for the Act to require the carrier and the union to negotiate concerning the settlement of the grievance and, while withholding power from them to make that settlement effective finally as against the employee, to relieve him altogether of obligation in the matter. Not only is he required to take affirmative steps. His failure to do so may result in the loss of his rights.

Elgin II, 327 U.S. at 665 (footnote omitted). This Court clarified its earlier opinion, emphasizing that the burden of disavowal is on the individual employee:

> [W]e did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights.

Id. at 666-67.

Respondents, who never disavowed the Union's representation, are surely in no better position than the plaintiffs in *Elgin II*. Indeed, Respondents may well be subject to a heavier burden of disavowal because, under the NLRA, individual grievants do not have an independent statutory right to pursue a grievance once their union has chosen a different course.

Indeed, the Court of Appeals for the Third Circuit has held that, even where a duty of fair representation might not be imposed by statute, it must be imposed whenever a union undertakes the representation. *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329 (3rd Cir. 1985).

> A union's assumption of the tasks of representation is one of the bases upon which the duty of fair representation can arise.
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> * * * *
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> Although in *Steele [v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944)] the 'granted power' was that granted to a collective bargaining representative under the Railway Labor Act, because of the strong federal policy favoring private dispute resolution, the power granted a union as the exclusive representative in the grievance process is equally compelling.

Koshatka, 762 F.2d at 335-36. That court imposed *Republic Steel's* exhaustion requirement on a non-bargaining-unit member, despite the union's control of the process, and noted that the plaintiff, in asserting to the contrary (like Respondents herein), "wants the collective bargaining cake, but wants to eat it too." *Id.* at 336.

Here the Union negotiated on Respondents' behalf until the very end, when agreement was finally reached as a result of limiting the proceeds to those employed on the ratification date, on the assumption that everyone was bound thereby. It was only Respondents' dissatisfaction with the result that provoked their belated contention that the Union lacked authority to compromise their claims. To accept this contention, and thereby annul the settlement as to them, contradicts this Court's opinion in *Elgin II* and the conclusion of the Third Circuit in *Koshatka*. It also substantially undermines the Congressional policy favoring the finality of settlements reached through the contractual grievance process. Respondents' recourse, if any, was not to claim that the union lacked settlement authority, but that it exercised its proper authority in bad faith.

II. THE COURT OF APPEALS IGNORED THE FACTORS THAT, UNDER THIS COURT'S APPROACH, GOVERN THE CHOICE OF THE APPROPRIATE LIMITATIONS PERIOD FOR A SECTION 301 SUIT CHALLENGING A FINAL GRIEVANCE SETTLEMENT AND CREATED A CONFLICT WITH OTHER CIRCUITS

Without any discernible analysis, the Court of Appeals concluded in a footnote that Respondents' action embodied a "straight" Section 301 claim to enforce a collective bargaining agreement, finding the instant claim similar to that presented in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986). *Merk*, 848 F.2d at 762 n.2. There, a union sued an employer for breach of a labor contract after its expiration, and neither party to the agreement sought arbitration of the dispute. *Elevator Constructors*, 798 F.2d at 224 n.1. The Seventh Circuit rejected the district court's application of the federal six-month period adopted in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); it held that, under this Court's decision in *United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966),[7] the most analogous state limitations period should be chosen, namely, the Indiana two-year period for actions relating to the terms and conditions of employment other than those based on a written contract. *Elevator Constructors*, 798 F.2d at 229-30.

In its footnote treatment of the limitations question in the instant case, the court below failed to recognize that *Elevator Constructors* involved a suit by a union rather than by individual employees, and that the individuals' action here

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[7] In *Hoosier Cardinal*, this Court held that, under Indiana's six-year limitations period for breach of oral contracts, the union's action for vacation pay had not been timely.

challenged a settlement reached by the Union.[8] Yet those differences have been given decisive weight by this Court:

> Unlike the present cases, *Hoosier* did not involve any agreement to submit disputes to arbitration, and the suit was brought by the Union itself rather than by an individual employee.

DelCostello, 462 U.S. at 162. In this case, as in *DelCostello*, Respondents' suit poses a direct challenge to "those consensual processes that federal labor law is chiefly designed to promote -- the formation of the collective agreement and the private settlement of disputes under it." *Id.* at 163 (quoting *Hoosier Cardinal*, 383 U.S. at 702). This Court has made it clear that the "borrowing" of state statutes governing ordinary contract actions in such cases does not strike "the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system." *Id.* at 171 (quoting from *United Parcel Service, Inc., v. Mitchell*, 451 U.S. 56, 70 (1981) (Stewart, J., concurring)).[9] Rather, the proper

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[8] Indeed, in *Elevator Constructors*, the Seventh Circuit emphasized that "the bargaining relationship in this case appears to have already broken down before the union filed suit .... A shorter statute of limitations would not serve to protect the bargaining relationship or the collective bargaining agreement." *Elevator Constructors*, 798 F.2d at 228 n. 5. Of course, just the opposite is true here, where Respondents are attacking the very agreement that restored the parties' previously harmonious bargaining relationship. (See n. 15, *infra*).

[9] In *Mitchell*, a bipartite joint panel established pursuant to a collective bargaining agreement upheld an employee's discharge. The employee brought a hybrid Section 301 suit against the employer and the union. The only question before this Court was the appropriate limitations period for the action against the employer. This Court held that action was more analogous to an action to vacate an arbitration award than to a straight contract action; hence, the district court had properly dismissed the action as untimely under New York's ninety-day limitations period for actions

(Footnote continued on the following page)

balance is struck by adoption of the six-month period in Section 10(b) of the NLRA. *Id.* at 171.[10]

This limitations period gives full recognition to the vital need for rapid resolution of labor disputes. As this Court has recognized, the system of industrial self government under labor contracts "could easily become unworkable" if terms of the agreement "could suddenly be called into question as much as [three] years later." *DelCostello*, 462 U.S. at 169 (quoting *Mitchell*, 451 U.S. at 64).

Even if the analysis of *DelCostello* were found to be inapplicable herein, Petitioner submits that the Court of Appeals' tolerance for a period "longer than twenty months" is unsupportable in these circumstances. *Merk*, 848 F.2d at 762 n.2. Petitioner had submitted to the courts below that the most analogous state limitations period was the ninety-days provided by the Illinois Arbitration Act for vacating arbitration awards. Granted this statute, by its terms, does not apply to awards "pursuant to a collective bargaining agreement."

(Continued)

[9] to vacate arbitration awards. Although the decision in this case involves an action against only the employer, this action also challenges the settlement of a contractual dispute reached by the parties through the contractual machinery. Consequently, with respect to the appropriate limitations period, the instant case implicates essentially the same considerations involved in *Mitchell*.

[10] This conclusion is consistent with the analysis recently employed by other Circuits. *See, e.g., Legutko v. International Brotherhood of Teamsters, Local 816*, -- F.2d --, 128 LRRM (BNA) 3228 (2nd Cir. 1988), where the court applied *DelCostello's* six-month limitations period to Section 301 claims alleging violations of the union constitution because "plaintiffs are attacking the manner in which the overtime provision of the collective bargaining agreement was ratified [so] their claims do relate to the formation of the collective agreement" and this limitations period "furthers the federal labor policy of promoting stability in labor relations and expeditious resolution of disputes." *Legutko*, 128 LRRM at 3233. These claims implicated the concerns identified in *DelCostello* just as the instant claim does.

ILL. REV. STAT. ch. 10 § 112(e). But the Seventh Circuit itself has acknowledged that, under *Mitchell*, the mere fact that a state court would not apply a limitations provision to a particular claim does not govern whether it is the most analogous one to adopt for a federal claim.

> [Plaintiffs] would have us apply Illinois' 5-year statute because its 90-day statute supposedly does not by its terms expressly apply even though federal labor policy strongly favors the 'relatively rapid disposition of labor disputes.' *Mitchell*, 451 U.S. at 63, 101 S.Ct. at 1564, quoting *Hoosier Cardinal*, 383 U.S. at 707, 86 S.Ct. at 1114. We are not, however, bound by the letter of state limitation statutes to disserve the spirit of national labor policy. *See Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367, 97 S.Ct. 2447, 2454, 53 L.Ed.2d 402; *Johnson v. Railway Express Agency*, 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295. The Supreme Court recently held as much in *United Parcel Service, Inc. v. Mitchell, supra.*
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> The Second Circuit declined to adopt the statute partly because it thought New York courts would not even entertain such a suit let alone measure its timeliness under a particular limitations rule. *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394, 398 (2nd Cir. 1980). The Supreme Court reversed, holding that the relevant consideration was not whether New York would in fact apply its statute to claims like Mitchell's but whether the kinds of claims to which it would apply its statute were 'closely analogous' to Mitchell's. 451 U.S. at 61 n. 3, 101 S.Ct. at 1563 n.3.

Stevens v. Gateway Transportation Company, 696 F.2d 500, 503-04 (7th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (A pre-*DelCostello* hybrid 301 suit wherein the court affirmed the

untimeliness of the action, under either the Illinois' 90-day period or the 6-month period in 10(b) of the NLRA). *And see Plumbers' Pension Fund v. Domas Mechanical Contractors, Inc.*, 778 F.2d 1266, 1269 n.1 (7th Cir. 1985).[11]

The District Court, however, rejected Petitioner's submission and held that Respondents' claim should not be characterized as an action to vacate an arbitration award because "no arbitration occurred." *Merk*, 641 F. Supp. at 1037.[12] The Court of Appeals failed to pass on this reasoning, but it also failed to suggest any other basis for rejecting the ninety-day period in this case.

In any event, the District Court's reasoning, which was not disturbed by the Court of Appeals, is contrary to that of the Court of Appeals for the Sixth Circuit in *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), where the court held that challenges to pre-arbitration dispute settlements should be characterized as actions to vacate arbitration awards even

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[11] *Domas* was a suit to enforce an arbitration award brought by union benefit funds. The Seventh Circuit held that "the company's failure to seek vacation of the arbitration award within the 90-day limitation period . . . bars it from challenging the . . . enforcement of the award." *Domas*, 778 F.2d at 1268.

[12] The District Court noted that, "even if the ninety-day period were to apply, to be faithful to Jewel's arbitration analogy the only sensible starting date for the period is the day of the 'arbitration decision', which can only be the day the Union and Jewel settled [in June of 1985]." *Merk*, 641 F.Supp. at 1037. The Court of Appeals did not reach the issue of when the limitations period began to run because, according to its reasoning, the suit was timely under any of the possible dates. But Petitioner submits that to say that Respondents' suit would have the effect of vacating the settlement is not to say that the cause of action arose at the time of the settlement. If the Union's duty of fair representation is not at issue here, the date of the settlement is rendered irrelevant. The operative date must be either the date of the contractual breach complained of, or the date(s) on which each individual Respondent had a right to act independently, namely, the respective dates of termination from Jewel's employment.

though "no arbitration occurred." *Badon*, 679 F.2d at 95 (A pre-*DelCostello* hybrid 301 suit where the court applied the 6-month period embodied in Section 10(b) of the NLRA).[13]

That court understood *Mitchell's* underlying rationale: "[w]here the parties have contracted to settle a claim among themselves, their final decisions should not be exposed to collateral attack for long periods but should become final rather quickly." *Id.* at 98. After all, "[i]t is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties." *United Mine Workers, District No. 2 v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3rd Cir. 1977).[14]

The five-year period selected by the district court and not disturbed on appeal flouts this Court's instructions regarding the considerations that govern the choice of a limitations period for actions challenging the parties' consensual adjustment processes. The decision below also rejects the approach adopted by other Circuits, and compromises the national

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[13] The disarray in this area is epitomized by the additional conflict between the Sixth Circuit in *Badon* and the Seventh Circuit in *Stevens* regarding whether explicit exemptions in the state statute bind a federal court. The Sixth Circuit concluded that "Mitchell requires us to honor Michigan's decision to exclude labor arbitration from the otherwise relevant twenty-day period." *Badon*, 679 F.2d at 98. *And see Occidental Chemical Corp. v. International Chemical Workers Union, Local 820* [to be reported at 853 F.2d 1310 (6th Cir. 1988)] (Available September 1, 1988 on WESTLAW, Allfeds Database), wherein the Sixth Circuit again rejected the state statute on that ground, and applied the three-month period embodied in Section 12 of the United States Arbitration Act, 9 U.S.C. § 12 (1982), to an action to vacate an arbitration award.

[14] Ironically, the Seventh Circuit has previously recognized that a pre-arbitration disposition is the functional equivalent of an arbitration award for statute of limitations purposes. *Hall v. Printing & Graphic Arts Union*, 696 F.2d 494, 497 (7th Cir. 1982) ("Nothing in the language of the collective bargaining agreement convinces us that decisions by the [union] not to pursue an employee's grievance all the way to arbitration are any less final or reliable than arbitration awards.")

interest in the prompt, uniform, complete, and economical disposition of contractual disputes.

III. THIS PETITION SHOULD BE GRANTED DESPITE THE INTERLOCUTORY NATURE OF THE APPEAL

The decision below involved interlocutory questions, but, as in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970), the nature of those questions calls for disposition at this stage of the litigation. If Petitioner were to prevail with respect to the appropriate limitations period, this dispute would be ended. The parties could avoid litigation that would not only be costly, but would also endanger the relationship between the parties to the labor contract.[15]

On the merits of the substantive issues involved, allowing the action against the employer to proceed in its present posture bristles with future complexities. If Respondents were ultimately to prevail in their contract action, and Jewel's position that the Union had a duty of fair representation was later upheld, a question would arise as to whether the Union would be bound in a subsequent action by the determination that Jewel had violated the agreement even though the Union was not a party to that action. If, as seems likely, the Union would not be bound, the issue of Jewel's breach of contract would have to be relitigated in an action against the Union by Respondents, or in a proceeding under *Bowen*. Furthermore, were Jewel to prevail on the issue of whether the Union had a duty, the issue of the Union's breach of its duty would then have to be litigated. That issue is, however, closely connected

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[15] In notifying the Regional Director of the NLRB of the settlement, the Union stated that it "believes that additional litigation would be injurious to its relationship with the Employer which has now been restored to its earlier harmonious level." (Jewel's Answer, Exhibit F). In this case, the controversy surrounding the Union's denial of an oral agreement will create similar adverse consequences.

with the merits of the contract action against Jewel. It would be manifestly wasteful and artificial to try those two interdependent issues in separate proceedings. In other words, to reject this Petition at this time solely because it results from an interlocutory appeal could result in "extraordinary inconvenience . . . in the conduct of the cause." *American Construction Co. v. Jacksonville, T&KW Railway Co.*, 148 U.S. 372, 384 (1893).

Finally, the decision below disrupts established bargaining practices and dispute resolution procedures by undercutting the authority and responsibilities of the exclusive bargaining agent, thus adding to the substantial uncertainties that already plague the labor relations arena. Expeditious resolution of these issues would reduce destabilizing uncertainty. By hearing this case now, before the impact of the lower courts' holdings upsets the balance achieved in labor-management relations, this Court can correct a serious mistake that can only have adverse effects on settlement negotiations between unions and employers nationwide.

The District Court certified the two questions presented herein as involving "controlling question[s] of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b). The Court of Appeals exercised its discretion and allowed the appeal on this basis. Petitioner submits that the same concerns are present at this stage of the proceedings and invite immediate review by this Court.

CONCLUSION

The decision below undermines the authority of the exclusive bargaining agent, and consequently undermines the agreed-upon machinery for dispute resolution that this Court, in response to Congressional policy and the needs of labor relations, has sought to protect. The destabilizing effects of allowing former employees to act as separate parties are exacerbated by the unduly long limitations period applied herein.

For all those reasons, and the reasons set forth above, Petitioner Jewel Food Stores, a division of Jewel Companies, Inc., respectfully requests this Court to grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-2723

KELLY MERK, et al.,

Plaintiffs-Appellees,

v.

JEWEL COMPANIES, INC.,

Defendant-Appellant,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7876—**Marvin E. Aspen**, *Judge.*

ARGUED OCTOBER 30, 1987—DECIDED MAY 31, 1988

Before FLAUM, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Jewel Companies, which operates a chain of supermarkets, reached a collective bargaining agreement with Local 881 of the United Food and Commercial Workers Union in September 1982. The agreement ran until June 1985. In December 1983 Jewel asked the Union to agree to a reduction in wages and benefits

notwithstanding the agreement. The Union refused. Jewel declared in February 1984 that an "impasse" had been reached and put its most recent proposal into effect. The result was a reduction of up to $1.25 per hour for about 18,000 employees.

Jewel claimed that it was entitled to reduce the hourly wage, notwithstanding the collective bargaining agreement, because it had an oral understanding with the Union that the question of wages would be reopened when a rival discount chain went into operation, which happened in the fall of 1983. The Union denied that it had made such a pledge and added that in its view an oral promise could not prevail over the written agreement. Its members overwhelmingly rejected a proposal to ratify the wage reductions. The Union invoked the arbitration clause of the agreement and asked the General Counsel of the National Labor Relations Board to issue a complaint charging Jewel with unfair labor practices. After Jewel refused to arbitrate the Union filed suit, and a district judge ordered Jewel to do so. The General Counsel eventually issued a complaint. Jewel was under the gun in two forums at once.

By then the collective bargaining agreement was nearing an end. Jewel and the Union tried to settle their dispute and reach a new agreement as a package. After hard bargaining they did so. Jewel agreed to restore most wages and benefits to the level provided in the 1982 agreement, retroactive to February 1984.[1] In June 1985 the Union's members ratified this agreement, roughly 80% voting in favor. The Union withdrew its request for arbitration, and at the joint request of Jewel and the Union the General Counsel dismissed the unfair labor practice charge. That dismissal is not reviewable. *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987).

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[1] The parties disagree about how close to full restoration and back pay this came. The dispute is not important for current purposes.

There was a catch. Only persons still employed on June 21, 1985, received back pay. Jewel takes the June 1985 agreement as a comprehensive settlement, extinguishing any rights of the 2,000 or so who retired, quit, or were fired between February 1984 and June 1985. The Union believes that the 1985 agreement, which is silent on the treatment of these employees, leave them to whatever devices they have under the 1982 agreement. In either case, Jewel was not making haste to give them cash, and the arbitration—which was within the Union's control—no longer offered them any prospects. Several of these former workers protested to the Labor Board's General Counsel, who ratified her decision to dismiss the complaint. They then filed this class action against Jewel and the Union, urging alternatively a breach of contract, reparable under §301 of the Labor-Management Relations Act, 29 U.S.C. §185, and a breach of the Union's duty of fair representation.

The district court granted summary judgment for the Union, concluding that it had no duty to represent—fairly or otherwise—persons no longer employed by Jewel at the time of the new contract. 641 F. Supp. 1024, 1027-32 (N.D. Ill. 1986). It could not breach a duty it did not owe. The tag-along "hybrid" contract/duty of fair representation claim against Jewel had to be dismissed as well. But the "straight" contract claim under §301 might have substance, the court thought, because Jewel paid the former employees less than the agreement specified. The Union, which was no longer the representative of the ex-employees, could not compromise their claims. The district court therefore denied Jewel's motion for summary judgment. It certified two questions under 28 U.S.C. §1292(b), and we accepted Jewel's interlocutory appeal.[2]

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[2] Jewel also contended that the suit is barred by the statute of limitations. The district court disagreed, 641 F. Supp. at 1032-37. Shortly after the district court's decision, we held in *International Union of Elevator Constructors v. Home Elevator Co.*, 798 F.2d

(Footnote continued on following page)

In this court, as in the district court, the parties assume that unless the Union fairly represented the former employees, Jewel's motion for summary judgment was properly denied. Jewel contends that the Union represented all of its present and former employees; the Union denies that it owed any duty to the former employees (but insists that, if it did, it represented them fairly); the plaintiffs maintain that the Union did not represent them (and that it sold them down the river, showing that any representation was inadequate). The district court concluded that the Union faced a hopeless conflict of interest. The former employees, no longer members of the bargaining unit, could not vote against any compromise, so that the officers of the Union had nothing to lose and everything to gain by giving away the ex-employees' rights in exchange for larger payments for current employees. The court concluded that the Union did not have, and if it had did not discharge, a duty to represent the former employees fairly.

We have some doubt whether this is the right way to approach the question. Perhaps if the Union did not represent the ex-employees, that simply left them to the mercy of Jewel. The entitlements established by collective bargaining agreements do not survive their expiration or

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[2] *continued*

222 (7th Cir. 1986), that "straight" §301 actions to enforce collective bargaining agreements would continue to be governed by the most analogous state statute of limitations, usually the period for breach of contract. The district court concluded that the most analogous period is given by Ill. Rev. Stat. ch. 110 ¶13-205, providing five years to sue on an oral contract. Whether five years or some other period is best, any period longer than 20 months is long enough to make this suit timely (it was filed in September 1985, and the claim arose no earlier than February 1984), and as Jewel does not suggest any period shorter than five years—other than the 90-day period for seeking arbitration and the six-month period now used for "hybrid" actions, both of which we rejected in *Home Elevator*, we agree with the district court that this suit is timely.

modification. So if, for example, the 1982-85 agreement had established a plan under which Jewel provided health benefits for its employees and retirees, the Union and Jewel would have been free to abolish those benefits for subsequent periods, even though the Union does not represent retirees. If the Union and Jewel had reached an impasse, Jewel would have been free to put into place its last proposal, which might not have included health benefits. *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311 (7th Cir. 1986); cf. *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988) (ERISA does not alter the rule of labor law in this respect). That the retirees had worked in earlier years in the expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement, any subjective expectation they may have had is not enforceable. And the Union, which under *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), does not necessarily represent retired workers, may choose to negoitate an agreement that provides more for today's workers and less for retirees. This becomes effective against retirees on the employer's say-so; the lack of representation does not give the retirees rights greater than those provided in collective bargaining agreements. Perhaps Jewel and the Union could undo the expectations of ex-workers about wages, just as they could frustrate their expectations about health benefits and other deferred compensation (to the extent ERISA does not cause these rights to vest). The collective bargaining agreement, after all, is between the Union and the employer, not between the workers (with union as agent) and the employer. On this view the union and employer may modify "their" agreement and let the chips fall where they may. Perhaps too Jewel can be seen as having invoked in February 1984 a modification clause (albeit unwritten) of the collective bargaining agreement, just as it says, after which everyone got the contracted-for wage between February 1984 and June 1985; when in June 1985

the Union negotiated "back pay" this was in the nature of a bonus for existing employees (in lieu of higher future wages) rather than reparations for an established wrong. The Union had no duty to any former employee in June 1985, so these persons cannot complain that the Union did not get them a "signing bonus" too: they did not sign and did not agree to reduce their future wages in exchange.

This is not necessarily the right way to look at the subject, however. The former employees do not contend that the terms of the 1982-85 collective bargaining agreement survived its expiration. They simply want the terms honored during the years they were in force, when, they contend, they were third party beneficiaries. Once they left Jewel's employ, as they see things, the Union lost any control over their fate. Had the Union agreed in June 1985 that its existing members would receive no back pay, the plaintiffs believe that this would not have affected their claims, which "vested" (the plaintiffs say) hour-by-hour as they worked between February 1984 and their last day at Jewel. This could create a bargaining nightmare, because no one could represent all of the former employees, and Jewel could not settle their claims even if it treated them exactly as it treated those who continued to work. It is not, however, such a fanciful position that we can reject it out of hand. Because the district court proceeded on the assumption that Jewel could not change the terms unilaterally once the 1982-85 agreement expired, and the parties have not briefed this question,[3] we resolve the case on the terms on which it was presented.

The district court asked the question: Is the Union the representative of the ex-employees, capable of compromising (here, extinguishing) their contractual rights? It answered "no" for two reasons: the former employees are

[3] Except for an allusion in note 1 of Jewel's reply brief, which is too little, too late.

not "employees" under §2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), so that the Union is not their statutory representative; and in any case the Union faced such a conflict of interest that it could not fulfill its implied duty of "fair representation", see *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967), and again is forbidden to compromise their claims. We start with the second point.

Conflicts among members of a union are inevitable and do not prevent a union from representing all employees in the bargaining unit. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). See also *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964). Older employees may want the union to obtain seniority systems and hefty pension plans, while younger employees may prefer wage scales linked to productivity and may want cash now rather than pensions later. As *Pittsburgh Plate Glass* demonstrates, unions face a conflict between benefits for active workers and benefits for the retired. Members will disagree about how to meld seniority lists in the event of a merger; some will prefer endtailing, some dovetailing. See *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976). Current members may like their high pay, while employers may want to reduce the average wage; union and employer therefore may agree that employees hired in the future (who by definition are not yet members of the bargaining unit) will receive lower pay. A two-tier wage structure poses many of the same problems as the two-tier settlement in this case. The list of potential conflicts can be extended indefinitely. Unions resolve these in bargaining, and they are not disqualified from representing members of the bargaining unit just because some members will benefit at the expense of others. There may be no satisfactory way to resolve the conflicts even in principle. See Mayer G.

Freed, Daniel D. Polsby & Matthew L. Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. Cal. L. Rev. 461 (1983). Congress has required unions to deal with conflicts by *considering* the interests of each group (the duty of fair representation) and by conducting internal operations in a democratic fashion. These statutory guarantees, coupled with the pressure the incumbent union faces from others seeking to organize the employees (or from the threat of decertification and non-union operation), induce unions to make reasoned choices. They will not be perfect, but they are apt to be good. See Comment, *The Union Judgment Rule*, 45 U. Chi. L. Rev. 980 (1987) (discussing the different sources of marketplace pressure leading unions to represent their many constituencies fairly well).

Sometimes the success of these devices—whether internal union politics or the threat of replacement by a new and better union—will be apparent. Suppose the Union, desirous of preserving a reputation for effective representation (in order to attract new members), had insisted that Jewel treat equally all who worked between February 1984 and June 1985, whether or not they were still on Jewel's payroll. Equal treatment would suggest that the Union had represented past employees fairly in relation to its current members.[4] So it is not impossible to imagine the Union adequately representing former employees, any more than it is impossible to imagine a union representing retirees vigorously. Every union knows that its members eventually become ex-employees as they retire or change jobs. Some will remain in the industry (and stay as members); the Union wants to keep them happy; many of the 2,000 former employees of Jewel must still work in supermarkets. Even those who plan to leave both in-

[4] "Suggest" rather than "prove", because the Union might accept a low settlement (say, 10¢ on the dollar for all) in order to get higher wages and benefits in the next contract; these future wages would accrue entirely to the existing work force, just as the payment of back wages under the actual agreement did.

dustry and union (by retirement or a change in line of work) want the union to look after their interests when they go, and they treat ex-employees well today so that they may be treated well tomorrow. The employer, too, has an interest in just treatment of former employees, for it wants to attract new labor and has a reputation to protect. It will look after former employees' interests, to an extent, in bargaining. Cf. Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. Chi. L. Rev. 1061 (1984). The potential for conflict among groups of employees therefore does not mean that a union is forbidden to attempt to broker the interests of the different groups. If it did, the idea of "exclusive representation", a bedrock principle of the NLRA, would quickly be lost. *Steele*, the first of the "fair representation" cases, concluded that only "hostile discrimination" (323 U.S. at 202-03) among members in negotiating a collective bargaining agreement violated the duty. See also *Flight Officers v. United Air Lines*, 756 F.2d 1274, 1281 (7th Cir. 1985). Certainly many a conflict arises, and is resolved, without such discrimination. Cf. James D. Holzhauer, *The Contractual Duty of Competent Representation*, 63 Chi.-Kent L. Rev. 255 (1987).

Our case involves more than the run-of-mine conflict among workers, however. It involves a conflict between current and former workers. Under §2(3) of the NLRA, 29 U.S.C. §152(3),

> The term "employee" shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any . . . individual employed as a supervisor . . . .

Although the statute does not in terms exclude workers who have retired, quit, or been fired, the parties have followed the implication of *Pittsburgh Plate Glass* in treat-

ing §2(3) as if it did. Jewel's former employees therefore lost their status as NLRA "employees" when they left work for reasons other than a labor dispute or unfair labor practice. Although failure to implement the terms of a collective bargaining agreement may be an unfair labor practice if it is an end run around the bargaining process, *Westinghouse Electric Corp. v. NLRB*, 809 F.2d 419 (7th Cir. 1987); *Fall River Savings Bank*, 260 N.L.R.B. 911 (1982), so that those who quit in protest (like those fired in violation of the agreement) remain "employees", neither Jewel nor the Union has contended that any substantial portion of the 2,000 quit for this reason. Unions represent ex-employees all the time when trying to obtain their reinstatement under an agreement, or when pressing other claims connected with their departures. The Union did not treat these 2,000 former workers as "employees" for the purpose of voting on the new pact in June 1985, however, and Jewel did not treat them as employees for any purpose. Again we follow the parties' lead in assuming that the 2,000 former workers are not statutory "employees"—without deciding whether this question would have had a different answer had the parties chosen a different litigating strategy.

A union need not represent non-employees. *Pittsburgh Plate Glass* establishes this.[5] Representation is not forbidden, however; §2(3) excludes supervisors from the status of "employee", but unions may represent supervisors with their, and the employer's, acquiescence. 29 U.S.C. §164(a); *Florida Power & Light Co. v. Electrical*

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[5] The union may not, however, deliberately injure (on forbidden grounds) even those whom it does not represent in bargaining. *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952). The extent to which such wrongful conduct may support a finding of unfair labor practices is canvassed in Bernard D. Meltzer & Stanley D. Henderson, **Labor Law** 1133-45 (3d ed. 1985). The Board has held lawful under the NLRA a settlement that favored existing employees over departed ones, *Steelworkers Local No. 2869*, 239 N.L.R.B. 982 (1978), but this does not resolve the question before us.

Workers, 417 U.S. 790, 812-13 (1974). Cf. *NLRB v. Electrical Workers*, 107 S. Ct. 2002 (1987); *NLRB v. Hendricks County Rural Electrical Membership Corp.*, 454 U.S. 170 (1981). So too unions may bargain on behalf of retirees if the employer is willing, although the retirees need not accept the offer of representation. *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20; *United Automobile Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1484 (6th Cir. 1983). Former employees might choose the union as their agent for purposes of implementing or compromising claims arising under a collective bargaining agreement. It is even possible that employees may assent through the agreement itself to make the union their agent to resolve all disputes arising out of the implementation of that agreement—disputes that by definition arise during the employment relation—even if they leave work before its end. Such a consent would enable the union and the employer to administer the agreement without the complications caused by a proliferation of parties as employees quit or leave. Perhaps consent of this sort should be implied from the presence of an arbitration clause, which appears to put the Union in charge of handling claims of current and former employees. Persons represented by a union and covered by a collective bargaining agreement—even those no longer working—must exhaust union remedies before filing suit under §301, see *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), which may imply that the union always administers the collective bargaining agreement even for those no longer classified as statutory "employees". Cf. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 774, 792, 811 (1973) (contending that collective bargaining agreements necessarily exclude the possibility of individual enforcement rights). Again, however, the parties have not discussed whether the former employees assented to representation by the Union—in the collective bargaining agreement itself or by acquiescing in the Union's pursuit of their rights through arbitration—or have exhausted their internal remedies. We do not speculate on the implications of such an approach for future litigation.

Having excluded other ways of looking at things, we are left with the district court's: that because the 2,000 former workers are not statutory "employees", the Union does not represent them. The Union owes no duty to those it does not represent. If it does not have a duty to represent them at all, it does not have a duty to represent them "fairly". The Supreme Court implied that duty from the statutory rule of exclusive representation. See *Steele* and *Vaca*. If the ex-workers are free to cut their own deals with Jewel, but let the Union bargain for them instead, then the Union's duty is fixed by the terms of any agreement creating these bargaining rights. The ex-employees' ability to shop for agents, to pit the union against members of the bar for the right to represent them on the claims, removes the foundation for implication of a "duty of fair representation". It leaves the plaintiffs in control of their own fate. And they have not compromised with Jewel their claims arising out of the 1982-85 agreement.

This is an unsettling conclusion, because it frustrates the ability of union and employer to resolve existing disputes. See *Republic Steel Corp.*, 379 U.S. at 653. Holdouts among the former employees may leave the dispute as a festering sore, undermining labor peace. Inability to reach a global settlement does not necessarily favor either employer or (ex-) employee; a settlement under a union's auspices presumably would reflect the chances of prevailing before an arbitrator or in court under a §301 suit, and former employees representing themselves may either settle on similar terms or press on to litigation, where they will win or lose but on average expect to get the same sort of deal that was reached in bargaining. The proliferation of persons with authority to bargain on their own will raise the cost of bringing the dispute to a conclusion, however, and the prospect of some ex-employees' suing and winning may make a union leery of compromising the claims of the current employees. The compromise will look bad in retrospect if ex-employees get 100¢ on the dollar. The net effect may be to delay settlement of

disputes and increase the risk borne by workers and employers alike.

Nonetheless, the parties' failure to make arguments that might have avoided this consequence leaves us with little choice. If the Union did not represent the plaintiffs *at all* in June 1985, then it is hard to see how it could have surrendered their claims. One of the Union's officers testified in a deposition that he perceived a conflict between current and former members of the bargaining unit and "absolutely" favored the active members. The plaintiffs were not part of the bargaining unit and were not notified of the settlement or offered an opportunity to vote on it.[6] The former employees did not receive any form of vicarious representation—that is, they did not get the same terms as those still employed on June 21, 1985. On the assumption, shared by all in the district court, that the "duty of fair representation" and the power to compromise the ex-employees' claims are necessarily linked, we hold that the Union did not have (and if it had did not fulfill) such a duty toward the plaintiffs in June 1985. The district court now must decide whether Jewel's unilateral reduction of wages and benefits in February 1984 violated the collective bargaining agreement.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[6] Jewel observes that the package deal settling the old dispute and adopting a new collective bargaining agreement passed by such a large margin that it would have been adopted had all 2,000 former employees appeared and voted "no". That may well be, but the former employees were excluded from the deliberations as well as from the voting, and we do not lightly assume that arguments made at union meetings are irrelevant to the members' decisions.

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APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

KELLY MERK, et al.,
Plaintiffs-Appellees,

No. 86-2723 *v.*

JEWEL COMPANIES, INC.,
Defendant-Appellant.

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 85 C 7876

Marvin E. Aspen,
Judge

ORDER

Defendant-Appellant filed a petition for rehearing and suggestion of rehearing en banc on June 14, 1988. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK and PATRICIA TODD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO and CLC,

Defendants.

NO. 85 C 7876

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

This case presents difficult labor law issues which appear to be of first impression. The plaintiffs are part of a putative class of former supermarket employees of defendant Jewel Food Stores ("Jewel"). Their three-count complaint under § 301(a)

of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a),[1] while pleading alternative and inconsistent claims for relief, seeks one remedy—payment of back wages which Jewel allegedly owes plaintiffs under a collective bargaining agreement. Counts II and III are against Jewel and the defendant Union respectively, and together comprise the familiar "hybrid" suit. These counts rest on the existence and breach of a duty of fair representation owed to plaintiffs by the Union. Count I is a direct § 301 claim against Jewel only; it rests on the alternative theory that the Union owed no duty of fair representation to these former employees. The Union has moved for summary judgment on Count III, arguing among other things that it owed no duty to plaintiffs. For the reasons stated below, we agree with the Union and must necessarily dismiss the entire hybrid part of the suit, that is, both Counts II and III. We also have before us Jewel's motion to dismiss Count I, which argues that the direct suit is barred by the six-month statute of limitations set forth in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983). For the reasons stated below that motion is denied.

I.

The following facts appear to be undisputed. On October 20, 1983, the Union and Jewel entered into a three-year collective bargaining agreement which was effective retroactive to September 19, 1982, and ran to June 15, 1985. Jewel runs about 180 supermarkets in and near Chicago employing some

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[1] That section reads:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

16,000 workers represented by the Union. In January 1984 the Union and Jewel started haggling over a modification of the agreement. Jewel says it believes that the Union had agreed orally in 1982 to reopen the contract for negotiation when the discount "Cub Food Stores" chain was to begin operations. Jewel says that under this oral "reopener" agreement it had the right to unilaterally implement any final offer it made, if the "reopened" negotiations reached impasse. The Union says it made no such agreement, but agreed to meet with Jewel in January 1984 to discuss a proposal by Jewel to cut wages and benefits.

These negotiations got nowhere, and on February 26, 1984, in accordance with what it called its "final offer at impasse," Jewel unilaterally cut wages and benefits below levels specified in the 1982-85 Agreement. The wage cuts were as high as $1.25 per hour, and vacation and personal day benefits were reduced as well. The Union demanded arbitration,[2] Jewel refused and so the Union sued Jewel to compel arbitration. *United Food & Commercial Workers Union, Local 881 v. Jewel Food Stores Division, Jewel Companies, Inc.*, No. 84 C 1648 (N.D. Ill.). The Union also lodged an unfair labor practice charge with the National Labor Relations Board ("NLRB").[3]

In December 1984, the NLRB urged Jewel and the Union to try to negotiate a settlement. The parties met and did not agree. However, the Union submitted Jewel's offer to the rank

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[2] Article IX of the Collective Bargaining Agreement contains the grievance and arbitration clauses the parties agreed to. Section 9.2 sets forth a three-step grievance procedure which appears largely informal. Section 9.3 allows either party to demand binding arbitration if the grievance procedure fails.

[3] On March 13, 1984, the NLRB's Regional Director dismissed the unfair labor practice charge. The Union appealed to the Board's General Counsel, who on September 7, 1984, sustained the appeal and instructed the Regional Director to issue a complaint. The Director did so, and a hearing was scheduled for June 24, 1985, before an Administrative Law Judge. Because of the parties' settlement, this hearing never took place.

and file, who followed the Union's recommendation to reject the offer. Negotiations continued into the spring.

On April 9, 1985, the District Court granted the Union's motion for summary judgment and ordered Jewel to arbitrate. Jewel filed a notice of appeal. Before anything came of the court proceedings, however, the Union and Jewel began more intense and fruitful negotiations. In light of the imminent expiration of the Agreement on June 15, 1985, they combined negotiations over the wage and benefit cut with talks over a new collective bargaining agreement. After a few meetings, Jewel proposed a settlement on May 19, 1985, which would restore most of the wages and benefits to their previous level and also would provide full retroactive pay for wages lost because of the cuts. However, this latter offer extended only to employees *then* on the payroll. The Union submitted the proposal to the membership and recommended acceptance. On June 21, 1985, more than 80% of current employees voted to ratify the new contract and the settlement agreement. As a result, the parties dismissed the Court suit and asked the NLRB to drop its proceedings, which it did.

The plaintiffs are part of a putative class, containing perhaps as many as 2,000 members, of former Jewel employees who were not part of the above settlement. The class includes employees who retired, who quit or who were fired at various points during the fifteen months of the protracted battle. That the class should be so large is not surprising, since turnover is, we presume, normally high in the supermarket industry. Because the settlement included only employees of Jewel as of June 21, 1985, plaintiffs received no retroactive pay for the time they worked during the dispute at the reduced salary. Since they were former Jewel employees and ex-members of the Union, they could not and did not vote on the June 21, 1985 settlement; nor could they wield political power within the Union. They were not notified of the proposed resolution and, specifically, were not told that the resolution would not include them. They must have learned about it somehow,

though, because they filed this suit on September 10, 1985, less than three months following the settlement.

Counts II and III form a traditional "hybrid" suit in the mold cast by *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048 (1976) and *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967). Count II alleges that Jewel breached the 1982-85 Agreement by cutting plaintiffs' wages; Count III alleges that the Union breached its duty of representing plaintiffs fairly when it reached a settlement which left them high and dry. The twist in this case, though, is that plaintiffs were former employees when the settlement was reached. They claim, in the alternative, and the Union agrees, that the Union owed no duty to these former members. To protect themselves, plaintiffs amended their original complaint to add an alternative theory in what is now Count I, a direct suit under § 301 against Jewel only.

The first issue is whether the Union owed the plaintiffs a duty of fair representation after they left Jewel. While the Union and the plaintiffs agree that no continuing duty existed, we still must decide the question, since Jewel claims that the duty existed. All parties apparently agree about the legal and practical consequences of our decision on this issue. If Jewel is right that the duty existed, then plaintiffs are limited to their hybrid suit in Counts II and III, and we must grant Jewel's motion to dismiss the direct suit, Count I. This result would favor Jewel and hurt the ex-employees, since to recover they would have to carry the substantial burden of showing in Counts II and III that the Union breached its duty of fair representation. However, if the plaintiffs and the Union are right that the duty vanished when plaintiffs did, then plaintiffs will proceed on Count I only. To recover the plaintiffs would need only show that Jewel breached the contract; with the Union out of and irrelevant to their claim, their task would be lighter and Jewel's exposure greater.

This latter result, which we reach below, raises a second issue. We must decide whether the six-month statute of limitations of § 10(b) of the NLRA applies to the direct suit. We will take up the two issues in order below.

II.

The duty of fair representation is a creature of the judiciary, created as a necessary complement to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*. The duty exists because the NLRA makes certified labor unions the exclusive bargaining representative of all employees in the bargaining unit. *See Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks*, 782 F.2d 674, 678-79 (7th Cir. 1986). Since the policy of exclusivity strips employees of normal methods of redress, for their protection, the employees' exclusive representative, the Union, necessarily has the duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909 (1967). However, this duty of fair representation extends no further than the Union's authority under § 9(a) of the NLRA, 29 U.S.C. § 159(a), to act as the exclusive representative of the bargaining unit. *See, e.g., Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers*, 764 F.2d 1316, 1320-21 (7th Cir. 1984). Thus, if the Union is not the exclusive representative of an employee, it has no corresponding duty to represent that employee fairly or at all. *See id.* at 1321.

The Union's authority to be exclusive representative is created and defined by the NLRA, and this authority exists only if a majority of "employees" in a "unit appropriate" for collective bargaining have elected the Union to be their exclusive representative. *See* § 9(a), 29 U.S.C. § 159(a). The Act defines "employee" in § 2(3), 29 U.S.C. § 152(3) as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a

> particular employer, unless this chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

The employer has a duty to bargain only with the Union representing "his employees" about wages, hours and the terms and conditions of employment. *See* 29 U.S.C. § 158(a)(5), § 158(d).

The plaintiffs and the Union make a simple and persuasive argument based on the above standards and definitions. When plaintiffs left Jewel, they were not "employees" of Jewel any longer, not "his employees," but ex-employees. Moreover, they were ex-members of the bargaining unit. They no longer paid dues and exercised no power within the Union. Not only would it defy common sense to make the Union exclusive representative of departed employees, it would be unfair to the ex-employees and the Union to do so. If the duty of fair representation lingered after the plaintiffs left Jewel, they would have been subject to the Union's exclusive representation but have had *no* control over their representatives. Unlike current employees who can vote against proposed contracts they do not like, vote against Union officers they do not like or try to decertify the Union altogether, the ex-employees would be stuck with a representative who is not beholden, and therefore unresponsive, to them.[4] If the duty existed, the Union would

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[4] While this whole line of argument might appear circular, it is not. In the argument, we have assumed that the ex-employees have lost their right to vote on contracts, for union officers and so on. Such an assumption (which Jewel nowhere disputes) implies that the ex-employees are no longer Union members, which is exactly the conclusion we are seeking to determine. In other words, one might say it is circular to prove that there is no duty of fair

(Footnote continued on the following page)

be forced to deal with an intolerable conflict of interest between its simultaneous duty to current and ex-employees. It would inevitably sacrifice the interest of ex-employees in order to satisfy current employees, who wield present and future power in the Union. To hold that the Union had a duty to continue representing plaintiffs would be tantamount to holding, that it had a duty to achieve the impossible.[5]

(Continued)

[4] representation by asuming that ex-employees are not Union members since that essentially assumes the conclusion. One might instead argue that plaintiffs *did* have the right to vote and participate in Union affairs, but no one knew it, and so they were unlawfully deprived of a chance to participate in the ratification of the contract.

But we have not improperly assumed our conclusion. As our discussion below of the *Allied Chemical* case makes clear, once they left these ex-employees could not properly remain part of the collective bargaining unit. Indeed, Jewel is not in fact claiming *both* that the Union owed a duty of fair representation to plaintiffs *and* that the plaintiffs were still Union members with a right to participate in Union affairs. Indeed, if Jewel were so arguing, there probably would have been a breach of the duty, since plaintiffs were not notified of or given a chance to vote on the June 1985 settlement. Instead, although Jewel does not say so, Jewel appears to be arguing implicitly that a residual duty of fair representation lingered as to *ex*-members of the Union, who had no corresponding right to participate in a settlement which left them high and dry. Jewel therefore appears to be arguing the plaintiffs were second-class Union members, bound to accept the consequences of the Union's exclusive representation but stripped of normal participatory rights accorded active employees. Jewel cannot have it both ways. If the duty existed, then plaintiffs were improperly denied the right to take part in the process of ratifying that settlement. If the plaintiffs were not Union members, then a direct rather than hybrid suit is warranted.

[5] The Union's brief in support of its motion for summary judgment, at 11, illustrates that plaintiffs would inevitably be sacrificed if they remained part of the unit and that the Union could not accommodate both factions:

> Even if it may be said that some lingering duty of fair representation remains in the case of former employees,

(Footnote continued on the following page)

None of the parties cited any cases on point. However, the plaintiffs did cite a few cases which are analogous to this case. Most important is *Allied Chemical & Alkali Workers of Americal, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383 (1971), where the Court held that "retirees" are not "employees" as defined in § 2(3) of the NLRA. The Court also held that the retirees "were not and could not be 'employees' included in the bargaining unit." 404 U.S. at 172, 92 S.Ct. at 394. The Court reasoned that the NLRA's scheme requires that a bargaining unit include only employees with mutual interests in the terms and conditions of employment. "Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit." *Id.* at 172-73, 92 S.Ct. at 394. The Court emphasized that the inclusion of retirees with current employees in one bargaining unit creates a serious conflict of interest rendering such a unit unworkable: the retirees are interested primarily or exclusively in pension-related issues, and *not* in the full range of issues of interest to current employees, such as wage rates,

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[5] it must be obvious that the Union's paramount duty is to the working membership and not to those who terminated their employment. In all its actions the welfare of the current membership must be the Union's controlling consideration. In achieving for the current membership a new contract, the Union discharged its primary and paramount responsibility. Indeed, its responsibility to the current membership so greatly outweighs any responsibility it might have to former employees that the Union was under an affirmative duty to present the settlement proposal to the membership even if it did not favor the proposal. A breach of the duty of fair representation could very well have occurred if Local 881 had refused to present Jewel's proposal to the membership for its acceptance simply because the retroactive pay portion of the proposal did not apply to former employees.

hours, working conditions, etc. With such a narrow interest at odds with other interests, retirees would "create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining." *Id.* In addition, there is the great danger that the Union would favor active employees over retirees. *Id.*

The retirees and other former employees in this case are analogous to the retirees in *Allied Chemical*. Whether or not they remained "employees" under § 2(3) of the NLRA, they were no more proper members of the bargaining unit once they left Jewel than were the retirees in *Allied*. The potential conflict of interest in such a situation is great, and, in fact, the record suggests that fears of a conflict of interest proved well-founded in this case.[8] Once they left, the plaintiffs had *one* narrow interest—recovering lost wages. The employees left behind had a much broader range of interests, including obtaining good future wages and working conditions, as well as securing future peace and stability in the form of a new collective bargaining agreement. The current employees had everything to gain and nothing to lose by cutting plaintiffs loose without a remedy. In leaving plaintiffs out of the agreement they gave up nothing of economic value to themselves, but gave Jewel an economic plum. Because Jewel apparently took a hard line as to plaintiffs, current employees could not have helped

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[8] The Union argues repeatedly in its briefs that its obligations to active employees gave it no choice but to throw plaintiffs overboard. This happened despite the apparent fact that Union President Ron Powell told Union members that those who left the membership would be protected. But Union leaders testified in their depositions that when push came to shove current, not former employees, were their "primary concern," and that they "bargained away a claim of people who had left our membership in favor of what we thought was a better offer for people who were part of our membership." Deposition of Thomas Walsh at 63. It appears that the Union tried initially to get the back pay for plaintiffs, but "bargained them away" when Jewel took a hard line as to plaintiffs in the final stages of negotiation.

plaintiffs without hurting their own position. This is a classic case of conflict of interest. If plaintiffs indeed remained part of the bargaining unit, they were nothing but a bargaining chip and helpless to prevent their former brothers and sisters from reluctantly tossing them onto the bargaining table.

Both of the factors *Allied Chemical* highlighted as important to a proper bargaining unit—coherence necessary for efficient bargaining and the lack of a submerged, distinct minority group—are relevant here. The plaintiffs were not and could not have been involved in the collective bargaining for a new contract, yet their sole interest would have become enmeshed in that process had they remained part of the unit. The parties very sensibly collapsed the negotiations over the wage cut with those over a new agreement. But plaintiffs could only have hindered that bargaining process if the Union had to account for and stand behind their interests. That is precisely why the Union gave up on plaintiffs' claims. *See* nn. 5 & 6 above. Moreover, our above discussion makes clear that if plaintiffs were indeed lingering members of the Union for the one purpose of their wage claim, they were indeed an isolated and submerged minority sect. The rationale of *Allied Chemical* argues against this result, and Jewel does not adequately deal with this rationale in its briefs. Following *Allied Chemical*, then, we hold that the plaintiffs were no longer proper members of the bargaining unit when they left Jewel.[7] They were like any other worker who quits a company—an ex-employee and ex-

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[7] A few other cases support this result as well. *See* Auto Workers v. Yard-Man, Inc., 716 F.2d 1476, 1484-85 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (Union owes no duty to retirees and retirees may resolve disputes over vested benefits directly with employer); Anderson v. Alpha Portland Industries, Inc., 752 F.2d 1293, 1296-1300 (8th Cir. 1985) *(en banc)* (retirees need not exhaust grievance or arbitration procedures for dispute over vested contractual benefits since they are outside of the the collective bargaining relationship), *cert. denied*, 105 S.Ct. 2329 (1985).

Union member. As we have seen, it would have been unworkable to define them as lame duck members of the unit for the sole and limited purpose of waiting for a settlement. It follows from this that the Union owed plaintiffs no duty of fair representation.

Jewel argues that the analysis above overlooks a crucial distinction between the retirees of *Allied Chemical* and the retirees and other former employees of this case. There, as in other cases cited above in n.7, the employer allegedly harmed the retirees *after* they had already severed their employment by retiring. In contrast, here all the plaintiffs were by definition active Union members under the Union's yoke, when Jewel cut their wages. When this happened the Union protested on plaintiff's behalf and sued to compel arbitration. Jewel essentially argues that once properly subject to the Union's efforts, plaintiffs were bound to the results of this process no matter how long it took and what changed in the meantime. Jewel relies on an analogy to the common situation where a Union must represent a discharged employee to try to get him or her reinstated, even though such an employee no longer works for the employer or pays Union dues while waiting for the outcome of the grievance.

Jewel's analogy suffers from several flaws. First, and most importantly, Jewel dances around the serious and inherent conflict of interest implicated in this case. In the typical case of one or a few discharged employees, there are simply no profound, inevitable conflicts, although some rather minor ones may sometimes appear. In this respect, the Union's reliance on *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1475 (7th Cir. 1985) is misplaced.[8] It is one thing to say that the Union owes a

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[8] *D'Amato* involved the Union's duty to a probationary employee, who is not at all like a retiree or like plaintiffs. The Court noted that a minor conflict of interest arises whenever a union represents a discharged employee. Some more junior employee could

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continuing duty to one or a few employees unjustly fired. Fullfillment of such a duty works no meaningful harm on other employees in the bargaining unit. The only ones harmed, if at all, are those with less seniority, and that harm is slight. *See* n.8 above. It is quite different to leap to a conclusion that the Union must, or even *can*, continue to represent adequately a class of up to two thousand former employees, *all* of whose narrow interests are diametrically opposed to those of *every* current employee. As we explained above, that would be like giving plaintiffs' two enemies the chance to play with plaintiffs' fate. In sum, while the Union can feasibly represent both the hypothetical discharged employees and those who remain, it could not balance the conflict between plaintiffs and Jewel's current employees.

Second, the duty to represent the discharged employee is clearly grounded in the NLRA. Such employees plainly fall within the definition of "employee" in § 2(3), which includes "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice." No one disputes that Congress intended that a vital function of the Union would be to protect "employees" fired in breach of a collective bargaining agreement or in violation of the NLRA. But plaintiffs do not fall so plainly within the definition of employee, and, unlike the case with discharged employees, we have no clear indication of congressional intent that a Union must continue to represent ex-employees like plaintiffs.

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[8] theoretically oppose reinstatement because that would harm his or her relative seniority position. That conflict does not mean the union cannot practically discharge its duty to the discharged employee, nor does it excuse him or her from failing to exhaust grievance procedures. 760 F.2d at 1489. The serious and actual conflicts in this case dwarf the abstract and "nascent conflict" mentioned in *D'Amato*. *Id.*

Jewel's analogy also fails for a third, related reason. In the case of the discharged employee, the employee's unwelcome new status as "ex-employee" results from the employer's unlawful act of firing him or her. That is, the *employer* makes the employee an erstwhile employee; the breach of contract or unfair labor practice confers the new status. The ensuing grievance centers around the employee's status: will she be *un*employed or *re*-employed? In sum, the wrong ruptures and the remedy repairs the employment relationship. Because the existence of this relationship is the very issue in dispute and, indeed, lies at the intersection of the collective bargaining and employment relationships, the employer cannot conclusively make the employee an ex-employee and ex-member of the Union simply by "terminating" him or her. The employment status remains unresolved until the dispute is resolved. In contrast, the dispute in this case does not involve plaintiffs' status as "employees" of Jewel or as "members" of the Union. Win or lose, they are and will remain *former* employees with no continuing ties to Jewel. Because plaintiffs' employment status is already long resolved, Jewel incorrectly equates them with discharged employees seeking reinstatement. Indeed, this distinction between former employees who do not want to return and discharged ones wanting their jobs back partly explains the deep conflict of interest detailed earlier. The interests of fired employees generally harmonize with those of current employees, and coincide if they get their remedy. Their long-term interests are very much in line, and thus the Union must represent discharged employees unless and until they lose their grievance. But in seeking their remedy plaintiffs have aligned themselves against the interests of *all* current employees. They seek only one thing and share no long-term interest with current employees. They simply do not properly belong in the bargaining unit.

Jewel also argues that plaintiffs' argument runs afoul of the NLRA's fundamental policy of exclusive representation. Like the previous argument, this contention sidesteps the con-

flicts of interest in this case. As *Allied Chemical* shows, "exclusive representation" does not mean "all-inclusive exclusive representation." Rather, only "appropriate" units may be certified. Our result is consistent with the policy of exclusive representation as it defines a unit for which exclusive representation can work appropriately. We have frustrated the NLRA's policy no more than *Allied Chemical* did.

We must emphasize the narrowness of our holding that the Union owed no duty of fair representation to plaintiffs when the settlement was reached. It depends *both* on plaintiffs' status as ex-employees of Jewel *and* on the serious conflict between their narrow interest and the interest of other employees.[9] Neither side cited, and we did not find, any case like this one, and given the rare circumstances, we think Jewel cries wolf when it laments that "[a]cceptance of Plaintiffs' position in this regard would effectively preclude management from *ever* relying on a Union resolution of a grievance for *anyone* that was not currently employed. Management would be deprived of the benefit of its contractual bargain, and the collective bargaining relationship would be seriously undermined." (Emphasis added.) Our holding carries no such broad ramifications. As we have described, our reasoning does not apply to employees fired in violation of a collective bargaining agreement. In any event, Jewel has not shown that it "relied" on Union resolution of the grievance *on behalf of* plaintiffs. The evidence suggests that Jewel insisted that plaintiffs be cut loose. The Union was not legally plaintiffs' exclusive agent any longer, and it appears that the Union reluctantly abandoned plaintiffs at Jewel's insistence. If Jewel "relied" on anything, we suspect it relied on its own bargaining gamble that it could save a great deal of money by trying to

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[9] Thus, we need not decide what would happen if, say, Jewel picked on only one or a few employees, cutting their wages, and these employees left Jewel over time. There is no systemic conflict in such a case and no necessary trade off by current employees negotiating a new contract.

bind plaintiffs to a deal in which they were as a practical matter unrepresented and powerless. If Jewel thought it could profit by the inherent conflict of interest in this case and bind plaintiffs to the result, it was simply mistaken and must live with the consequences. The new contract is not undermined as a result. Jewel simply make a false legal assumption in signing it. And far from "depriving management of its contractual bargain," our result will help ensure that Jewel lives up to its original bargain and that plaintiffs enjoy the benefit of that bargain.[10] Of course, we express no opinion now on the merits, that is, on whether there was in fact a breach which deprived plaintiffs of their bargain.

In sum, we conclude that in this unique case the Union had no continuing duty to represent plaintiffs when it finally settled its dispute with Jewel. Accordingly, the hybrid suit, Counts II and III, must be dismissed, and the employees may properly proceed in Count I against Jewel alone.

III.

We come, then, to Jewel's alternative argument that a direct suit in Count I is barred by the statute of limitations. For the following reasons, we do not think that the six-month limitations period of § 10(b) of the NLRA properly applies to this direct suit which is essentially one for breach of contract. Instead, Illinois' five-year limitations period for breach of oral contract controls this suit.

A.

The parties agree that interpretation of *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281

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[10] True, the original agreement also envisioned a private grievance procedure. But Jewel refused to abide by that procedure, so it is disingenuous for Jewel to rely on it now. In any event, the original agreement did not call for the Union to represent former employees in their grievances.

(1983), is crucial to analyzing the issue. *Del Costello* was a traditional hybrid suit under § 301, in which the employee alleged that he was discharged in violation of the collective bargaining agreement, and that the union had prosecuted his unsuccessful grievance "in a discriminatory, arbitrary, and perfunctory manner." The suit was filed just under six months after the arbitration result became final.[11] The district court dismissed the suit, applying Maryland's thirty-day limitations period for suits to vacate arbitration awards. The Court of Appeals affirmed. The Supreme Court reversed, holding that the six-month limitations period of § 10(b) of the NLRA was the most analogous and proper one for this type of hybrid suit. The Court's rationale took several steps which we shall detail.

The Court began by noting that § 301's omission of a limitations period required it to borrow a period from some other source. The norm is to borrow the most appropriate state statute of limitations, as the Court did in *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107 (1966), but the Court noted it could in unusual circumstances deviate from the norm, if borrowing a state period would frustrate or interfere with national policy. The Court carefully distinguished the hybrid suit from the "straightforward suit under § 301" in *Hoosier Cardinal*, where borrowing a state limitation for breach of contract was held proper. 461 U.S. at 162-63, 103 S.Ct. at 2289. In *Hoosier Cardinal* the union rather than the employee sued the employer over a collective bargaining agreement which had no grievance or arbitration mechanism. The *Hoosier Cardinal* Court refused to adopt a uniform federal standard, finding that the case was closely akin to a "normal" state law breach of contract suit, and as such did not directly involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." 383 U.S. at

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[11] *Del Costello* involved two consolidated cases. We are giving just one of the fact patterns here.

782, 86 S.Ct. at 1111. In contrast, *Del Costello* emphasized how the typical hybrid suit does implicate these dual consensual processes. Because the hybrid suit requires the employee to show the Union breached the duty of fair representation, it directly challenges the private settlements of disputes under the collective bargaining agreement. 461 U.S. at 164-65, 103 S.Ct. at 2290-91.

Not only is the compound, hybrid suit therefore unlike a simple contract suit, the Court felt that as a uniquely federal creature the hybrid suit has no close analogy in ordinary state law. Neither normal contract limitations periods nor those of arbitration suits fit it well. The latter periods are typically too short to protect employees who are generally green in matters of collective bargaining; and the employees' § 301 claim against the union stems from policies unrelated to those underlying the decision about a proper arbitration period. Not only are arbitration periods too short, statutes for breach of contract or for malpractice[12] are too long. The machinery for resolving Union disputes would become unstable if its resolution can be tampered with many years later. 461 U.S. at 165-68, 103 S.Ct. at 2291-92.

Finding no analogous state law period for the hybrid suit, the Court turned to and found a quite suitable period in federal law, § 10(b) of the NLRA. That section requires chargers of unfair labor practices to be brought before the NLRB within six months. The court noticed a "family resemblance" between an unfair labor practice and the breach of the duty of fair representation. Because Congress already fine-tuned this six-month period to balance the federal interest in stable bargaining and finality of disputes against the employee's interest in having time to set aside an unjust settlement, the Court found

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[12] The Court considered and rejected the argument that the duty of fair representation suit against the Union is like one for legal malpractice. *See* 462 U.S. at 167-68, 103 S.Ct. at 2292.

§ 10(b) to be an apt period for that cousin of the unfair labor practice case—the hybrid suit. 461 U.S. at 169-71, 103 S.Ct. at 2293-94. The Court stressed, however, that in applying a uniform, federal period it was taking an unusual, though not unprecedented, step, and that its "holding . . . should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy." 461 U.S. at 171-72, 103 S.Ct. at 2294.

Despite the Court's limitation of the holding in *Del Costello*, the lower federal courts have been applying *Del Costello* rather liberally in § 301 suits, and even in other labor law contexts. For example, it is probably true that *Del Costello* now applies to *any* hybrid suit under § 301, not just to suits to *vacate* a grievance, which *Del Costello* was. *See, e.g., Flores v. Levy Co.*, 757 F.2d 806, 808-09 (7th Cir. 1985) (and cases cited therein); *Taylor v. Ford Motor Co.*, 761 F.2d 931, 932 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 849 (1986). Moreover, several courts have applied *Del Costello* to suits between unions and employees under Title I of the Labor Management Reporting & Disclosure Act ("LMRDA"), 29 U.S.C. § 411-412. *See, e.g., Davis v. Auto Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1284 (1986); *Vallone v. Teamsters Local No. 705*, 755 F.2d 520, 521-22 (7th Cir. 1985); *Local Union 1397 v. Steelworkers*, 748 F.2d 180, 182-84 (3d Cir. 1984); *but see Doty v. Sewall*, 784 F.2d 1, 3-10 (1st Cir. 1986); *Rodovich v. House Wreckers*, 624 F.Supp. 678, 681-93 (S.D.N.Y. 1985); *Testa v. Gallagher*, 621 F.Supp. 476, 477-78 (S.D.N.Y. 1985). However, the courts have eschewed *Del Costello* in favor of state law periods in some labor cases under § 301. For instance, a suit between an employee against a union alleging a breach of the union's own constitution was held to be essentially contractual and governed by the state law limitations period for breach of contract. *Papianni v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 11*, 622

F.Supp. 1559, 1572-76 (D.N.J. 1985). Similarly, a suit under § 301 by trustees of a pension fund against an employer for failure to contribute to the fund in violation of a collective bargaining agreement was held subject to the six-year limitations period for breach of contract. *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 167-68 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1181 (1985). And when a third party employer sues a union under § 303 of the LMRA because of a secondary boycott, a state law period for tortious interference with business relations is more analogous than § 10(b) *See Carruthers Ready-Mix v. Cement Masons*, 779 F.2d 320, 324-27 (6th Cir. 1985); *Monarch Long Beach Corp. v. Soft Drink Workers*, 762 F.2d 228, 230-31 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 569 (1985); *Park Electric Co. v. Electrical Workers*, 593 F.Supp. 1060, 1063-65 (N.D. Ill. 1984) (Plunkett, J.). Finally, a *non-hybrid* suit brought under § 301 by an employer or union to vacate an arbitration award is controlled by the state law period governing suits challenging such awards. *Plumbers Pension Fund v. Domas Mechanical Contractors, Inc.*, 778 F.2d 1266, 1268-70 (7th Cir. 1985).

As the above summary of *Del Costello* and its offspring suggests, this Court and the parties have had no better luck finding cases on point than we did when dealing with the duty of fair representation issue. However, the above cases offer some help. Viewed together, the cases show that *Del Costello* extends beyond its facts, probably to any hybrid suit under § 301, and sometimes beyond § 301; but *Del Costello* has not swallowed all federal labor disputes or even all § 301 suits. The cases share the same approach to the issue. They analyze the rationale of *Del Costello* to see whether its logic applies sensibly to the peculiarities of the case at bar. *See, e.g., Plumbers Pension Fund*, 778 F.2d at 268-70. We do the same below. While the question is close, we hold that the case resembles *Hoosier Cardinal* more than *Del Costello* and therefore a state limitation period for breach of contract controls.

B.

At the outset, we observe that the Supreme Court in *Del Costello* left the holding of *Hoosier Cardinal* intact, albeit narrowed, and emphasized that resort to state law "remains the norm for borrowing of limitations periods." 461 U.S. at 171, 103 S.Ct. at 2294. *Del Costello* deviated from the norm because of several characteristics of the hybrid suit which make it a special creature--of a species apart from the straightforward contractual dispute of *Hoosier Cardinal*. *See O'Hare*, 740 F.2d at 168 (*Del Costello* "turns on the peculiar nature of the duty of fair representation action, and cannot reasonably be expanded to all Section 301 claims that involve facts which might also have established an unfair labor practice charge.") The key to the hybrid suit is the breach of the duty of fair representation, which as we saw in Part II above flows from the federal labor policy of exclusive representation. That policy is implicated in every hybrid suit. Moreover, the hybrid suit typically challenges the result reached by the consensual process this exclusive representative, the Union, and managment have engaged in; it usually entangles either the formation of a collective bargaining agreement or, more typically, the private settlement through grievance or arbitration of a dispute under one. Congress designed the six-month period of § 10 (b) with these policies, among others, in mind.

This unique case differs from the typical hybrid suit like *Del Costello* in several fundamental ways. *No* duty of representation is involved, so, as we held above, it is a direct rather than hybrid suit. This alone makes the case look more like *Hoosier Cardinal* than *Del Costello*. But more importantly, plaintiffs fell *outside* of the normal private dispute resolution machinery. Once they left Jewel, they also fell outside of the future collective bargaining process. Regardless of how the case turns out on the merits, the private settlement that Jewel and the Union reached will remain intact and unchallenged. The active employees will have received their settlement, and both sides will continue to be bound by their new collective

bargaining agreement. Unlike the typical hybrid suit, which seeks to modify a collective bargaining agreement or to overturn a result reached through a grievance or settlement of a dispute under such an agreement, this case does not intrude on the new contract or settlement reached between Jewel and the Union. This result flows naturally from the holding that no duty of representation existed. The plaintiffs' rights and their remedy are distinct from those of current employees. In short, because plaintiffs were not part of any settlement, this case, unlike *Del Costello*, does not directly implicate "those consensual processes that federal labor law is chiefly designed to promote."[13] 461 U.S. at 163, 103 S.Ct. at 2289. Section 10 (b), which was designed to strengthen and defend the stability of bargaining relationships and to protect a collective bargaining system from delayed attack, *see United Parcel Service v. Mitchell*, 451 U.S. 56, 68, 101 S.Ct. 1559, 1567, (1981) (Stewart, J., concurring), does not pertain to this case, since plaintiffs fell out of the bargaining relationship and system and have no continuing relationship with Jewel.

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[13] We reject Jewel's strenuous argument that this direct suit will undermine the settlement. Jewel offers no legal reason that the contract is not binding. We are not dismantling that agreement. Jewel's real complaint, once again, is that its expectations were undermined, that it signed a contract thinking it had gotten away with scuttling plaintiffs' claims. But plaintiffs were simply not represented then, and Jewel tried to capitalize on that. Jewel made a miscalculation that does not let it off the hook now. Jewel also suggests that our holding means current employees will get less when the next contract comes up, and that our result therefore interferes with the collective bargaining process. This theory (or threat perhaps) is speculation. Given the uncertainties of economics, we cannot say now that our result *necessarily* means current employees will get less in the next contract. That assumes a fixed economic pie. Jewel's theory also only poses an indirect effect on future "consensual processes." We do not think attenuated effects on the process were the kinds *Del Costello* contemplated.

Papianni v. Iron Workers, 622 F.Supp. at 1572-76, offers a slightly different approach which yields the same conclusion. In holding that a suit for breach of a union's constitution is not covered by *Del Costello*, the court distinguished its case from one "absolutely predicated on the existence of an implied claim under the NLRA, or some other federally created right." *Id.* at 1575. *Del Costello* would apply to such suits with a basic "predicate" in federal law or policy–hybrid suits, LMRDA suits, suits to compel arbitration–while *Hoosier Cardinal* remains in control of straight, non-hybrid § 301 suits essentially predicated on breach of contract. *Id.* Applying this "predicate" approach, we see that this suit is not predicated on the duty of fair representation or directly on other substantive federal rights, but simply on the breach of a contract, as was the case in *Hoosier Cardinal*. To hold that *Del Costello* controls this case would be to hold, in effect, that it overruled *Hoosier Cardinal* which it plainly did not.

While this suit differs from *Del Costello* in several ways, we must acknowledge that one of the rationales underlying *Del Costello*–the federal policy favoring quick resolution of labor disputes–does argue for applying the short, six-month limitations period rather than the five-year period we apply below. But that was only one factor which motivated the court in *Del Costello* and cannot suffice by itself to demand adoption of the period of § 10 (b). If this policy alone could carry the day, § 10 (b) would apply to virtually *all* labor disputes, even breach of contract suits not analogous to suits under the NLRA. This result would conflict with *Del Costello's* admonition that borrowing from state law remains the norm, "*in labor law* or elsewhere." 461 U.S. at 171, 103 S.Ct. at 2281. Indeed, the "quick resolution" argument, if sufficient by itself, contradicts the result of *Hoosier Cardinal*, implying once again that *Hoosier Cardinal* had been implicitly overruled, even though *Del Costello* narrowed but reaffirmed the earlier case. And despite the pressure to use short limitations periods in any labor dispute, courts have not done so where the other rationales of *Del*

Costello did not apply. In sum, while a six-month period might for some reasons be desirable, the continued viability of *Hoosier Cardinal* and the Supreme Court's limiting language in *Del Costello* require the Court to borrow the state statute of limitations most analogous to this case.

C.

Plaintiffs contend that either Illinois' five-year period for breach of oral contract, Ill.Rev.Stat. ch. 110, ¶ 13-205 (1985), or the ten-year period for breach of written contract, Ill.Rev.Stat. ch. 110, ¶ 13-206 (1985), applies to this suit. While at first glance, it would seem that the latter period controls since the collective bargaining agreement is written, Illinois courts have applied the five-year statute to suits under collective bargaining agreements. *See Pratl v. Hawthorn—Mellody Farms Dairy, Inc.*, 53 Ill.App.3d 344, 347, 368 N.E.2d 767, 770 (1st Dist. 1977); *Matzer v. Florsheim Shoe Co.*, 132 Ill.App.2d 470, 472-73, 270 N.E.2d 75 (1st Dist. 1971). The courts follow common law doctrine saying that a contract is not "in writing" unless the parties to it, as well as its terms, can be learned from the document itself. If a party is not named in the contract, parol evidence must establish that the person is a party. Thus, since employees are not named in collective bargaining agreements, and parol evidence is needed to show that they are beneficiaries of it, Illinois law defines the contract as "oral" for purposes of appling a statute of limitations to a suit brought by the unnamed party. *See Pratl*, 53 Ill.App.3d at 347, 368 N.E.2d at 770. We therefore find that the five-year period is the most analogous Illinois period, since that is the one Illinois courts have applied in the rare cases where they have been called upon to resolve contract disputes involving collective bargaining agreements. Plaintiffs' suit is plainly timely under this statute.

In light of this analysis, we reject Jewel's argument that the ninety-day period found in the Uniform Arbitration

Act, Ill.Rev.Stat. ch. 10, ¶112(b) (1984),[14] applies here, for the obvious reason that no arbitration occurred involving plaintiffs. Indeed, Jewel exhibits a bit of "chutzpah" in making this argument, since it refused to arbitrate in the first place. But even if its ultimate settlement with the Union could be squeezed into the definition of "arbitration," it was not one which plaintiffs were a party to. Jewel cites no case and offers no sound reason supporting its position that the limitations period for commercial arbitrations would apply to suits where no real arbitration took place and where the plaintiffs were not party to the quasi-arbitration which happened. In any event, even if the ninety-day period were to apply, to be faithful to Jewel's arbitration analogy the only sensible starting date for the period is the day of the "arbitration decision," which can only be the day the Union and Jewel settled. Since plaintiffs sued within ninety days of that settlement, the arbitration period would not bar this suit even if Jewel were right that it was somehow relevant.

---

[14] That Section reads:

> (b) An application under this Section shall be made within 90 days after delivery of a copy of the award to the applicant, except that if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

IV.

Because the Union owed plaintiffs no continuing duty of fair representation after they left Jewel, we grant the Union's motion for summary judgment and dismiss Counts II and III. We also deny Jewel's motion to dismiss Count I to the extent it is based on the fair representation issue. That motion is also denied with respect to its limitations arguments. In light of our result, we deny as moot Jewel's motion for judgment on the pleadings on Counts II and III and plaintiffs' motion to strike that motion. It is so ordered.

/s/ MARVIN E. ASPEN

Marvin E. Aspen
United States District Judge

DATED 6/26/86

APPENDIX D

STATUTES INVOLVED

Federal Statutes:

29 U.S.C. § 159(a).

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 160(b).

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint

may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. § 173(d).

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 185(a).

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

State Statutes:

Ill. Rev. Stat. ch. 10 § 112.

Vacating an award. (a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any one of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by the circuit court is not ground for vacating or refusing to confirm the award.

(b) An application under this Section shall be made within 90 days after delivery of a copy of the award to the applicant, except that if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in Section 3, or if the award is vacated on grounds set forth in clauses (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. The time within which

the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

(e) Nothing in this Section or any other Section of this Act shall apply to the vacating, modifying, or correcting of any award entered as a result of an arbitration agreement which is a part of or pursuant to a collective bargaining agreement; and the grounds for vacating, modifying, or correcting such an award shall be those which existed prior to the enactment of this Act. (Footnotes omitted).

Ill. Rev. Stat. ch. 110 § 13-205.

Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. (Footnotes omitted).

APPENDIX E

ARTICLE IX
NO STRIKES; NO LOCKOUTS; GRIEVANCES & ARBITRATION

Section 9.1 No Strikes; No Lockouts

The Union and the Employer agree on the need for the continuance of their service to the public without interruption. Both recognize this objective as necessary to the security of the Employer and its people. Both, therefore, specifically pledge themselves to help assure that security by using the procedures agreed upon between them for the adjustment of disputes and grievances in all cases where there is any difference of opinion concerning the rights of either under this Contract or the interpretation or application of any provision of it. Therefore, during the term of this Agreement there shall be no strikes, stoppages, diminution or suspension of work of any kind whatsoever on the part of the Union or its membership; nor shall there be any lockout on the part of the Employer.

Section 9.2 Grievances

(A) Grievance Defined

A grievance is hereby defined as any dispute involving the interpretation or application of the provisions of the Contract.

(B) Procedure

A grievance may be initiated by any individual employee, by the Union or by the Employer. Once initiated, the following steps shall be taken to settle such grievance:

Step 1: By conference between the aggrieved employee, the shop steward, or both, and the Store Manager or Resident.

Step 2: By conference between a Union representative and the Store Manager and/or the Divisional Manager or other representative designated by the Divisional Manager.

Step 3: By conference between a Union representative and the Grocery Operating Manager or such other official as the Employer may designate to represent it in such conference.

Any grievance initiated or carried to Step 3 shall be reduced to writing. Grievances involving only one store shall be introduced only at Steps 1 or 2, while grievances involving more than one store may be introduced at any step. All grievances shall be investigated and answered promptly.

(C) Time Limits on Grievances

Any grievance involving a claim of improper discharge or other discipline must be presented within fifteen (15) days after discharge or disciplinary action. All other grievances excluding discharge or disciplinary action must be made within thirty (30) calendar days after the cause giving rise to the grievance becomes evident. Wage claims involving the proper application of wage rates shall not be valid and collectible for a period earlier than 180 calendar days prior to the date of filing the claims. All other wage claims as to the number of hours worked shall not be valid and collectible for a period earlier than ninety (90) days prior to the date of filing the claim.

Section 9.3 Arbitration

(A) Either the Union or the Employer may, within thirty (30) calendar days after failure to adjust the grievance in accordance with the grievance procedure, serve upon the other party a written demand for arbitration stating the issue to be arbitrated. The parties shall endeavor to select an impartial arbitrator. However, if the parties fail to agree upon an arbitrator who is willing and able to serve within fifteen (15) calendar days after service of the demand for arbitration, either party may, within seven (7) calendar days thereafter, request the American Arbitration Association to submit a list of not less than five (5) disinterested persons who are qualified and willing to act

as impartial arbitrators. Upon receipt of this list, an authorized representative of the Union and of the Employer shall flip a coin to determine who shall have first choice to strike a name. The party winning the toss shall then strike a name from the panel. Thereafter, the parties shall alternately strike one name each until only one name remains. The person whose name remains shall be the selected arbitrator.

(B) The arbitrator shall commence hearings as quickly as possible after his selection and shall render his award in writing together with his written findings and conclusions as quickly as reasonably possible after the hearing. The award shall be final and binding upon the parties to this Agreement and upon the complaining employee or employees, if any.

The arbitrator shall have no power to determine arbitrability nor to add or substract from, modify, or amend any provision of this Agreement, nor to substitute his discretion for the discretion of the Union or the Employer, change existing wage rates, or arbitrate proposals for the amendment or renewal of this Agreement.

The arbitrator's fees and expenses, the cost of any hearing room and the cost of a shorthand reporter and of the original transcript shall be borne equally by the parties. All other cost and expenses shall be borne by the party incurring them.

(C) For the purpose of entertaining a written request from either of the parties for rehearing to correct any material error of omission or commission, ambiguity, or question of application allegedly evident in the opinion or award the arbitrator shall, for a period of seven (7) calendar days next following the date of his award, retain jurisdiction of the matter submitted to arbitration by the parties hereto, and until the expiration of the period of time stated in this provision for rehearing the award shall not

be deemed to have been issued. If, however, no request for rehearing is duly filed within this seven (7) day period, this award shall be deemed to be issued effective as of its date. A written request for rehearing shall detail the specific grounds relied upon for alleging a material error, or ambiguity, and a copy thereof shall be mailed by certified mail to the other party or parties. If the written request is postmarked no later than the seventh (7th) day next following the date this award, it shall extend the jurisdiction of the arbitrator for a period of seven (7) days next following the date of the written request. Within those seven days the arbitrator, having reexamined the matter, shall in writing either reject the request for a rehearing or set a date for the requested rehearing. If the request for rehearing be denied, this award shall thereupon be deemed to be issued effective that date and the jurisdiction of the arbitrator shall accordingly cease. If the request for rehearing be granted, the jurisdiction of the arbitrator shall continue until issuance of a final amended award incorporating or rejecting the substance of the allegations contained in the request.

(D) The participation by the parties in an arbitration proceeding under this Agreement shall not be deemed a waiver of or prejudicial to the right of either party to contest the arbitrability of the grievance or the jurisdiction and authority of the arbitrator in proceedings to set aside the award or in other appropriate proceedings in any State or Federal court of competent jurisdiction; provided such judicial proceedings are instituted within thirty (30) days of the date of the arbitrator's award.

Supreme Court, U.S.
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(2)

No. 88-523

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.,

Petitioner,

v.

KELLY MERK, et al.,

Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,

Respondent.

RESPONDENT UNION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 881 ("the Union") herewith files its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by Jewel Food Stores, a Division of Jewel Companies, Inc. ("Jewel").

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE IT RAISES NO ISSUES DEMANDING IMMEDIATE REVIEW

Jewel requests that this Court grant its Petition for Certiorari to review an interlocutory order of the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. Sec. 1254(1). The issues raised by the Petition are (1) whether the Union owed a duty of fair representation to Respondents Kelly Merk et. al., ("Respondents") who were former employees of Jewel and former members of the Union; and (2) whether the courts below properly ruled that the action against Jewel was not barred by the statute of limitations.[1] (Petition, pp. 8-20 and 21-27)

No question exists that this Court rigorously limits its discretion to grant certiorari after final judgment because of its already enormous caseload. A fortiori only the most compelling reasons justify granting this extraordinary remedy to review an interlocutory order. As stated in *Denver v. New York Trust Co.*, 229 U.S. 123 (1913):

> "The exceptional power to review, upon certiorari, a decision of the circuit court of appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

Put most succinctly, these proceedings do not raise critical issues of national concern demanding immediate review such as the issues that were raised in the Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

---

1 The Union shall not address the limitations question because its resolution in the context of a direct breach of contract action against Jewel has no impact upon the Union.

This litigation in its present posture requires the district court to determine whether Jewel violated the collective bargaining agreement between Jewel and the Union by unilaterally reducing Respondents' wages and benefits in February, 1984 (Pet. Appendix A, p. A-13), and the remedy, if any, to which Respondents may be entitled.

Jewel argues that a denial of the Petition will cause it "extraordinary inconvenience" based on its suggested, but highly speculative scenario of future events. On the contrary, this Court's present expenditure of time is quite unnecessary. If Jewel were to ultimately prevail on the issue of whether its conduct was actionable by Respondents, this litigation would terminate. It would not then be necessary for this Court to address any of the questions raised by the Petition. Should Jewel be found to be liable to Respondents for having breached the contract, Jewel, by pursuing all appeals available to it, may cause this Court to be confronted with the issues now raised in the Petition. Jewel would only be required to litigate the Union's duty of fair representation (a previously unlitigated issue) and, perhaps, further litigate its breach of contract (if judgment already entered on that issue is not collaterally binding on the Union) assuming first, it is found liable, second, it seeks certiorari and certiorari is granted, and third, this Court then reverses and remands based on the issues raised herein.

In no event will a denial of the Petition irreparably foreclose Jewel from litigating the issues it here seeks to raise. Nor will a denial of the Petition disrupt the bargaining relationship between Jewel and the Union. Successor collective bargaining agreements have already been executed. Respondent former employees have, by definition, left Jewel's employ and the Union's membership. In short, resolution of the Union's duty to Respondent former employees can easily await the outcome of the normal litigation process.

II. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW WILL HAVE LITTLE IF ANY APPLICATION OUTSIDE OF THIS CASE

The Petition for Certiorari depicts the Court of Appeals' ruling here as a "sweeping decision that a union does not owe a duty of fair representation to former employees and does not bind them by a grievance settlement," (Petition, p. 8). This characterization is a total distortion of the Court of appeals' limited opinion carefully tailored to the particular situation here. Specifically, the opinion explicitly rests on the parties' agreement that all former employee respondents would not be considered "employees" under Section 2(3) of the NLRA, 29 U.S.C. Sec. 152(3). See Pet. Appendix A, p. A-10 ("[w]e follow the parties' lead in assuming that the 2,000 former workers are not statutory 'employees' – without deciding whether this question would have had a different answer had the parties chosen a different litigating strategy.") See also Pet. Appendix A, p. A-13 (conclusion based on "parties' failure to make arguments that might have avoided this consequence").[2]

The precedential value of the decision below is thus, to say the least, extremely limited. A decision that rests so entirely on various assumptions of law by the parties – and thus binds virtually no one other than the parties – is certainly not worthy of this Court's consideration.

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2 It is beyond challenge that the Court of Appeals rested its analysis on this premise, and the precedential value of the decision is thus restricted accordingly.

III. THE PETITION SHOULD BE DENIED BECAUSE THE COURT BELOW PROPERLY FOUND THAT THE UNION OWED NO DUTY OF FAIR REPRESENTATION TO RESPONDENTS AND ITS DECISION DOES NOT CONFLICT WITH THIS OR ANY OTHER COURT

The Court of Appeals found that the Union owed no duty to Respondent former employees following *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) because "[a] union need not represent non-employees." (Pet. Appendix A, p. A-10) Because Respondents are not statutory employees within the meaning of Section 2(3) of the NLRA, 29 U.S.C. Sec. 152(3) – a conclusion which the Court of Appeals rested in part on the parties' own legal arguments – "the Union does not represent them. The Union owes no duty to those it does not represent." (Pet. Appendix A, p. A-12)

Jewel asserts that the Union owed a duty to fairly represent Respondent former employees first, because at one time, the Union was Respondents' exclusive bargaining representative as were the unions in such cases as *Humphrey v. Moore*, 375 U.S. 335 (1942); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); and, secondly, because the Union undertook Respondents' representation, citing *Elgin, Joliet & Eastern Railway Co. v. Burley*, 327 U.S. 661 (1946); *Kesner v. N.L.R.B.*, 532 F.2d 1169 (7th Cir. 1976); *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329 (3d Cir. 1985). Petitioner thus asserts that the decision below conflicts with these cases.

The cases cited by Jewel are inapposite because such decisions either involve present employees for whom the union is indisputably the exclusive bargaining agent, or cases in which litigation was initiated to establish whether plain-

tiff is or will continue to be an employee within the meaning of Sec. 2(3) of the NLRA 29 U.S.C. 152(3). Thus, in *Humphrey* and *Elgin, Joliet and Eastern Railway*, plaintiffs were current employees within the bargaining unit represented by the union. In *Vaca, Bowen*, and *Hines*, plaintiffs were dischargees seeking to re-establish their status as employees and members of the bargaining unit represented by the union. The *Kesner* and *Koshatka* decisions also involve plaintiffs seeking to establish their positions as employees within the bargaining unit. Based on the *Pittsburgh Plate Glass* rationale, the Union simply did not owe a duty to Respondents once they were no longer "employees."[3]

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3 In *Republic Steel*, plaintiff's status as an "employee" was assumed without discussion by the parties and the Court. In any event, *Pittsburgh Plate Glass* was decided six years after Republic Steel, and is more analogous to these proceedings.

CONCLUSION

For the reasons stated above, Respondent, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881, respectfully requests this Court to deny Jewel's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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QUESTION PRESENTED

Can a Union adequately represent the interests of active and former workers within a single bargaining unit where the interests of former workers are in direct conflict with the interests of the active members of the bargaining unit?

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Respondents, KELLY MERK, et al., respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT

Respondents in the present suit are former employees of Jewel Food Stores, a Division of Jewel Companies, Inc. ("Jewel") and former members of the United Food

and Commercial Workers Union Local No. 881 ("Union"). Respondents were employed by Jewel on February 26, 1984, when Jewel unilaterally reduced wages and benefits to over 18,000 Jewel employees. Jewel implemented the forced pay and benefit cuts pursuant to an alleged oral reopener agreement which Jewel contends was reached prior to the execution and ratification of the 1982-1985 collective bargaining agreement. The Union denied the existence of an oral reopener and filed suit against Jewel to compel arbitration and enforce the subject collective bargaining agreement. The grievance initiated by the Union was resolved in June of 1985 after Jewel agreed to award retroactive pay and restore certain benefits to all persons who were employed by the Company as of June 21, 1985. The Union sent the settlement proposal to its current membership with the recommendation that its membership accept the proposal which excluded Respondents and the proposed class.

Respondents include retirees and other persons who terminated from Jewel during the fifteen months of protracted litigation prior to the grievance resolution. At the time of the resolution, the Respondents were no longer dues paying members of the Union and accordingly did not have the power to vote or exercise political power within the Union structure. The Respondents were not notified of the proposed grievance resolution, the terms of the resolution or the fact that the resolution would only pertain to those persons employed as of June 21, 1985.

REASONS FOR DENYING WRIT

I. THE ISSUES RAISED BY PETITIONER ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW

This case presents a rare and unusual factual situation which was narrowly decided and limited by the lower courts to its unique facts and the litigation strategies adopted by the parties.

> We must emphasize the narrowness of our holding that the Union owed no duty of fair representation to plaintiffs when the settlement was reached. It depends both on plaintiffs' status as ex-employees of Jewel and on the serious conflict of interest between their narrow interests and the interests of other employees. Neither side cited, and we did not find, any case like this one, and given the rare circumstances, we think Jewel cries wolf when it laments that "acceptance of plaintiffs' position in this regard would effectively preclude management from *ever* relying on Union resolution of a grievance for *anyone* that was not currently employed. Management would be deprived of the benefit of its contractual bargain, and the collective bargaining relationship would be serious undermined." (Emphasis added) Our holding carries no such broad ramifications.

Merk v. Jewel, 641 F. Supp. 1024, 1032 (N.D. Ill. 1986). In its Memorandum Order denying Petitioner's motion for reconsideration, the district court stated:

> But the conflict in this case is special and unusual, as it involves former employees with a discrete conflict of interest with current employees .... Also, despite Jewel's argument to the contrary, we continue to believe that this case is rare and poses no threat to the sanctity of the collective bargaining system.

Memorandum Order at 2 (Appendix A). The court of appeals noted that the case before it did not present a "run-of-mine" conflict. *Merk v. Jewel*, 848 F. 2d 761, 765 (7th Cir. 1988).

Moreover, the court of appeals repeatedly made clear that its resolution was closely tied to the parties' presentation of the issues and ruminated at some length on the propriety of alternative approaches. The court did "not speculate on the implications of such an approach for future litigation," and was "left with the district court's" approach to the issues. 848 F. 2d at 766.

There is therefore little reason to believe that this case will have any appreciable impact beyond its unique facts.[1]

Furthermore, the issue which Petitioner seeks to have this Court review is whether its breach of the labor contract will be litigated in the context of a direct action by former employees or whether it will be determined in the context of the Union's duty of fair representation. If this case proceeds, unreviewed by this Court, the parties will litigate a straightforward breach of contract action between a group of former employees and their former employer. Should this Court intervene and reverse the decision below, Respondents will continue to litigate the breach of contract action against Petitioner in a hybrid action. Respondents' additional burden of showing that the Union breached its duty of fair representation appears to have been met.[2]

II. THE PRESENT CASE IS NOT RIPE FOR REVIEW BY THIS COURT

The district court characterized the case before it as one of first impression. 641 F. Supp. at 1025. In the exercise of its discretion, this Court will frequently await the development of a conflict between the circuits in order to gain the benefit of analysis by other courts before exercising its prerogative as final arbiter of federal law. *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984). Granting a writ of certiorari in this case, which presents novel issues, would

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[1] Every case which has cited the district court's opinion with respect to the statute of limitations issue has found it persuasive. *Niro v. Fearn International, Inc.*, 827 F. 2d 173, 177 (7th Cir. 1987); *Kwak v. Joyce*, 683 F. Supp. 1546, 1549 (N.D. Ill. 1988); *Ozite Corp. v. Upholsterers International Union*, 671 F.Supp. 565, 567 (N.D. Ill. 1987); *Chicago Web v. Chicago Tribune*, 657 F. Supp. 351, 357 (N.D. Ill. 1987). The court of appeals handled the statute of limitations issue in a footnote. It is clearly not an issue of sufficient importance to warrant a grant of certiorari.

[2] *See, Merk v. Jewel*, 641 F. Supp. 1024, 1028, fn.4 (N.D. Ill. 1986); *Merk v. Jewel*, 848 F. 2d 761, 767 (7th Cir. 1988).

defeat that salutary purpose. Review of this case at this time would sacrifice this Court's scarce resources on a non-controversial issue.

Secondly, while Petitioner's arguments, as framed below, center on the Union's duty of fair representation, Petitioner extensively discusses for the first time here its contention that Respondents must exhaust Union mediated contractual grievance procedures before bringing an action under Section 301, 29 U.S.C. 185. The issue of whether Respondents are required to exhaust contract grievance procedures is presently being litigated before the district court. Petitioner has moved in the district court to dismiss under Rule 12(b)(6), arguing that the Respondents, even if not represented by the Union, have a duty to exhaust the grievance and arbitration procedures contained in the collective bargaining agreement.[3]

Assuming, arguendo, that Petitioner's motion to dismiss were granted by the district court, the issues raised before this Court would be rendered moot. The interlocutory nature of this appeal when coupled with the pendency of a dispositive motion in the district court results in the likelihood that this Court's opinion will be merely advisory. Such a result violates a basic principle upon which our judicial system is premised, namely that two courts cannot have jurisdiction over the same case at the same time. *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 289 (1980).

Moreover, due to the interlocutory nature of this case many legal issues remain to be decided relating to both liability and damages.[4]

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[3] A copy of Petitioner's pending motion to dismiss is attached as Appendix B.

[4] Respondents have presently pending in the district court a motion for partial summary judgment.

Review by this Court of the issues decided below will not result in a final determination on the merits of Respondents' claims. Petitioner's attempt to have select legal issues resolved in a piecemeal fashion should not be countenanced by this Court.

III. THE LOWER COURTS' RULINGS DO NOT CONFLICT WITH OTHER CIRCUITS' DECISIONS

Petitioner contends that the lower court decisions conflict with *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F. 2d 329 (3d Cir. 1985). The inappropriateness of this argument is suggested by the failure of the court of appeals to discuss this case, despite Petitioner's citation of it to that court. Petitioner relies on *Koshatka* as support for its position that the Union, once it undertook representation of plaintiffs, was bound to continue that representation. However, the cases are factually and legally unrelated. Unlike the present case, in *Koshatka*, there were no conflicting interests between the individual and the Union. In *Koshatka*, the plaintiff sought to become a full time employee and be included in the bargaining unit, since his part-time duties had expanded to greater time and responsibility than the full time Union members. The lack of an actual conflict between employee and union was crucial to the court's decision and an issue which caused it concern.

> We have a special concern here because of the unfortunate possibility that the Guild may be more interested in having Guild members perform appellant's work than in effectively pressing his grievance. The Guild's future conduct should be strictly scrutinized for possible conflicts of interest.

762 F. 2d at 336.

In *Koshatka*, the conflict between the employee and his Union was inchoate, but still a matter of concern for the court. In the present case, the conflict between the inter-

ests of Union and narrow interest of the former employees was fully developed and found to preclude the effective representation of former employees by the Union. Further highlighting the distinction, in *Koshatka*, the plaintiff sought to *become* a member of the larger Union bargaining unit; in effect to become an "employee." Plaintiff sought to protect his interests by joining with others who shared those interests. In this case, Respondents left the bargaining unit and severed all ties to the unit, save the single interest in recovering their earned but unpaid wages. This crucial distinction makes *Koshatka* inapposite.

IV. THE OPINIONS BELOW PROPERLY APPLIED THIS COURT'S PRECEDENTS

Petitioner contends that the decisions of the lower courts stand in conflict with previous decisions of this Court which create a presumption in favor of Union mediated arbitration for the interpretation of collective bargaining agreements. Petitioner contends that since the grievance arose under the contract, it must be governed by the contractual enforcement procedures. However, this Court has never held that aggrieved employees must utilize the contractual grievance procedures in all situations. In fact, this Court has frequently identified situations in which individuals with rights created under a collective bargaining agreement may proceed individually to vindicate their claims against a recalcitrant employer. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), excuses the obligation to employ Union based remedies in those situations where the employer repudiates the contractual arbitration procedures. In *Glover v. St. Louis - San Francisco Railway Co.*, 393 U.S. 324, 330 (1969), this Court held that an employee may proceed directly against his employer when the effort to proceed with formal contractual or administrative remedies would be futile. In *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), this Court held that employee benefit fund trustees need not utilize

the arbitration procedures contained in the collective bargaining agreement to enforce their rights under the agreement.

These cases make clear that the preference for private dispute resolution is far from an absolute rule. Courts may, in appropriate circumstances, permit direct actions by aggrieved individuals for enforcement of collective bargaining agreements. Petitioner's assertion that the lower courts' decisions conflict with this Court's rulings oversimplifies the analysis this Court and other courts have used in determining whether a direct action is permissible. This Court has frequently held that the preference for Union mediated contractual grievance and arbitration procedures will be put aside in those circumstances where the use of the Union conduit is not appropriate.

A proper understanding of the decisions below rests on an understanding of the lower courts' analysis of *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). *Pittsburgh Plate Glass* holds that the statutory definition of employee found in NLRA Section 2(3), 29 U.S.C. Section 152(3), may not be separated from those rights guaranteed under Section 7 of the Act, particularly the right to bargain collectively in an appropriate unit. In seeking to determine whether retirees fit within the statutory definition of employee, the Court reaffirmed that "in doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning." 404 U.S. at 168. By looking to the policies underlying the Act, the Court in *Pittsburgh Plate Glass* established that the statutory definition of employee necessarily includes a community of interest analysis.[5]

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[5] This Court held in *Pittsburgh Plate Glass:*

> In this cause, in addition to holding that pensioners are not 'employees' within the meaning of the collective-bargaining obligations of the Act, we hold that they

(Footnote continued on the following page)

The essence of the Court's analysis is the recognition that retirees' interests are inherently in conflict with the interests of active employees. As a result of this conflict, they may not be properly included within the collective bargaining unit with active employees.

> Here, even if, as the board found, active and retired employees share a common concern in assuring that latter's benefits remain adequate, they plainly do not share a community of interest broad enough to justify inclusion of the retirees in a bargaining unit. Petitioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions and all other terms of active employment. Incorporating such a limited purpose constituency in the bargaining unit would create the potential for severe internal conflicts that impair the unit's ability to function and would disrupt the processes of collective bargaining. Moreover, the risk can not be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favorable to active employees at the expense of retirees' benefits.

404 U.S. at 173. Inherent in the definition of employee under the NLRA is the notion that employees share common interests and goals and therefore may act together to bargain collectively or take other concerted action utilizing their economic weapons and advancing their economic interests. "The term 'employee' must be understood with reference to the purpose of the act and the facts involved in the economic relationship." [Citation omitted] 404 U.S. at 167.

The decisions of the lower courts exclude Respondents from the definition of employee because Respondents lack

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5 *(Continued)*

were not and could not be 'employees' included in the bargaining unit. 404 U.S. at 172.

the common interests and goals which the Act seeks to foster and protect. The retirees in *Pittsburgh Plate Glass* were not excluded from the definition of employee simply because they were no longer working. *Compare, Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959). More importantly, as retirees, they lacked a community of interests with active workers sufficient to justify inclusion of them in a common bargaining unit. The statutory definition of employee necessarily incorporates the notion of common interests and, where interests diverge, appropriate individuals must be excluded from the bargaining unit.

It is the conflict of interest analysis that was of the greatest interest to the district court and court of appeals. Respondents, like the retirees in *Pittsburgh Plate Glass*, had a narrow, single interest. They were a "functionally distinct minority," 404 U.S. at 172, with a single, narrow interest in obtaining lost wages. The district court repeatedly emphasized the profound and inherent conflict which the Union faced in representing both active and former employees. In addition to the obvious semantic observation that "former employees" are not "employees," the lower courts recognized that Respondents were not employees within the meaning of the Act to the extent that their interests were in conflict with active employees.

A similar result can be reached using the analytic framework developed in *Schneider*. In *Schneider*, this Court reasoned that the presumption of arbitrability (which *Republic Steel v. Maddox*, 379 U.S. 650 (1965), makes clear is intertwined with the Union's duty of fair representation) is designed to further the national labor policy of peaceful resolution of labor disputes by requiring the parties to forego the economic weapons of strikes and lockouts. This Court refused to apply that presumption in the context of enforcing the terms of a collective bargaining agreement when the party seeking to enforce the agreement had no recourse to economic weapons.

> Arbitration promotes labor peace because it requires the parties to forego the economic weapons of strikes and lockouts. Because the trustees of employee benefit funds have no recourse to either of those weapons, requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all.

466 U.S. at 372. Respondents, like the trustees in *Schneider*, have no recourse to economic weapons. They were "an isolated and submerged minority sect." 641 F.Supp. at 1030. They are neither members of the Union nor employees of the company. While active members might reasonably forego the lost wages resulting from the employer's unilateral wage and benefit cuts in exchange for more wages, benefits or job security in the future, Respondents had nothing to trade. They had no economic weapons at their disposal and so posed no threat to labor peace. The Respondents' economic weakness removes the justification for reliance on Union mediated grievance resolution which Petitioner emphasizes so heavily. In the absence of this justification, there is no reason to prefer a Union mediated remedy, and a direct action may be maintained.

The interaction of *Pittsburgh Plate Glass* and *Schneider* was carefully analyzed by the court in *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir. 1985) (en banc), *cert. denied*, 471 U.S. 1102 (1985). The *Anderson* court concluded that retirees need not exhaust union mediated contract grievance procedures and could pursue a direct action against the employer for breach of the collective bargaining agreement. The court analyzed the position of retirees to determine whether they had more in common with the trustees considered by the *Schneider* court or with active employees. The court followed the analysis used in *Pittsburgh Plate Glass* to conclude that retirees' interests often conflicted with those of active workers and that retirees have no recourse to economic weapons. Therefore, the court followed the lead of

Schneider to determine that the presumption of arbitrability was not applicable. 752 F.2d at 1297-98.

The defendant in *Anderson*, like the Petitioner here, contended that *Maddox* and its progeny required union mediated arbitration based on the Union's exclusive representation of employees. The court rejected this contention:

> The cases cited by Alpha do not justify letting a union mediate the interests of a 'functionally distinct minority' which can not be made part of the bargaining unit and which, as the Supreme Court pointed out, does not have a vote in union affairs.

752 F.2d at 1297. The *Anderson* court realized, like the lower courts here, that *Maddox* and its progeny are not applicable in the situation where there is a significant conflict among the interests of beneficiaries to a collective bargaining agreement. The *Anderson* court's analysis establishes that the decisions in the present case are logical and appropriate extensions of the analysis used by this Court to define the scope and extent of a union's right and duty of exclusive representation. In this rare case where a functionally distinct minority of individuals exists, with a narrow interest in sharp conflict with the majority interests, the presumption in favor of exclusive representation must give way to the individual employees' ability to pursue a direct remedy against an employer who has breached the collective bargaining agreement. The district court's holding that the right of exclusive representation and its correlative duty of fair representation are vitiated only when the plaintiffs are both ex-employees *and* have a serious conflict between their narrow interest and broader interests of active employees does not conflict with the holdings of this Court or violate federal labor policy. *Merk*, 641 F. Supp. at 1031.

In addition, the result below equitably resolves the case between the parties. Implicit in the decisions below is the recognition that Petitioner must not be allowed to

profit by placing the Union in the untenable position of representing the completely divergent interests of active and former Union members. As the district court astutely observed:

> If Jewel 'relied' on anything, we suspect it relied on its own bargaining gamble that it could save a great deal of money by trying to bind plaintiffs to a deal in which they were as a practical matter unrepresented and powerless. If Jewel thought it could profit by the inherent conflict of interest in this case and bind plaintiffs to the result, it was simply mistaken and must live with the consequences. The new contract is not undermined as a result. Jewel simply make a false legal assumption in signing it. And far from 'depriving management of its contractual bargain,' our result will help ensure that Jewel lives up to its original bargain and that plaintiffs enjoy the benefit of that bargain.

641 F.Supp. at 1032.

In summary, the decisions below properly synthesize the precedents of this Court to effectuate national labor policy and resolve a difficult and novel question.

CONCLUSION

For the reasons set forth above, Respondents Kelly Merk, et al., respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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WILLIAM J. CREMER*
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200 W. Adams Street,
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Date: October 27, 1988

**Counsel of Record*

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK and PATRICIA TODD, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 881, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO and CLC,

Defendants.

NO. 85 C 7876

MEMORANDUM ORDER

MARVIN E. ASPEN, District Judge:

A.

For the reasons that follow, Jewel's motion to reconsider the Court's June 26, 1986 opinion is denied.

With respect to the "duty of fair representation" issue, *see* June 26 opinion at 6-16, Jewel says little it did not say earlier, and we adhere to our analysis in the opinion. Jewel continues to give short shrift to the nature and depth of the conflict of interest in this case. We agree with Jewel's

uncontroversial premise that unions often balance conflicts between groups of employees, and that under typical labor law cases they still have a duty to represent all groups fairly. But the conflict in this case is special and unusual, as it involves *former* employees with a discrete conflict of interest with current employees. As the *Allied Chemical* case teaches, 404 U.S. at 172-75, 92 S.Ct. at 394-96, where conflicts between current and former employees are sharp, and where a powerful majority group with many interests will likely dominate a discrete minority with limited interest, the former employees can no longer be considered appropriate members of the bargaining unit, subject to the union's representation. We continue to believe that *Allied Chemical* is closely analogous to this case, and that it supports our holding that the Union owed no duty to plaintiffs.

Also, despite Jewel's arguments to the contrary, we continue to believe that this case is rare and poses no threat to the sanctity of the collective bargaining system. We disagree with Jewel that our opinion will give an incentive to employees involved in a labor dispute to quit and seek an individual remedy rather than stay on the job, bound to the Union's representations. More likely than this far-fetched scenario is the other side of the coin: a holding contrary to ours could encourage unscrupulous employers to cut wages and benefits unilaterally and drag out a battle with a union, hoping that, as employees leave as part of normal attrition during the long delay, it could play upon the conflict between former employees and union members and save money by reaching a settlement freezing out those employees who left. In any event, putting aside speculation about the effect of our holding on future cases, we think that the failure of the parties and the Court to find reported cases like this one demonstrates that this type of case will not be common, and that the impact of our holding is limited to the unusual fact pattern of this case.

Turning to the statute of limitations issue, we find that Jewel offers nothing significant that it did not argue earlier. We stand by our opinion and deny that part of the motion to reconsider as well.

B.

We grant Jewel's motion to certify an interlocutory appeal and to stay proceedings in this Court pending the appeal. Under 28 U.S.C. § 1292(b), a district court may certify an interlocutory appeal if when it enters an order and believes that the order

(1) involves a controlling question of law,

(2) as to which there is substantial ground for difference of opinion, and

(3) that an immediate appeal may materially advance the ultimate termination of the litigation.[1]

The first two criteria are easily met in this case. Our June 26 opinion and order involved two such controlling questions, one involving the duty of fair representation and the second the proper statute of limitations. At minimum a question is controlling when it would constitute reversible error on appeal if wrongly decided. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 855 (1974); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure*, § 3930 (1977) at 159. Both questions plainly meet this standard; they are pivotal. Moreover, there is substantial ground for difference of opinion with respect to both questions. As our opinion described, there was no good precedent for either issue. We had an unusual fact situation

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[1] That section reads in full:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction

(Footnote continued on the following page)

falling into a gap in both doctrines analyzed, and the correct answer is not obvious.

We also find that the third criterion for interlocutory review is met. Limitations issues are particularly appropriate under this element if the other elements are met, since decision of the issue might dispose of the suit, or at least drastically curtail its scope. *See, e.g., Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 291 n.2 (8th Cir. 1975); 16 Wright & Miller, § 3931 at 181. Similarly, immediate appeal of the duty of fair representation issue may also bring a speedier and more efficient end to this suit. If we are reversed, we will avoid going to trial on the merits without the Union; the shape and direction of the suit differs significantly depending on the Union's presence in the suit. As we noted in our June 26 opinion at 5, plaintiffs' two theories of recoveries are mutually exclusive. It will ultimately save cost and time to resolve finally this watershed issue as early as possible.

For all the above reasons, certification of an interlocutory appeal is warranted here. We also believe a stay of lower court proceedings pending appeal is proper here. The next status hearing is hereby set for January 9, 1987, for a report on the progress of the appeal. The parties shall also report promptly any decisions or significant order of the Court of Appeals in this case. It is so ordered.

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1 *(continued)*

> of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

C.

The motions of Jewel and the Union to consolidate this case with No. 85 C 10362 as related under Local Rule 2.31 are granted. We find that the criteria of that Rule are satisfied.

D.

In conclusion, Jewel's motion to reconsider is denied. The motions to consolidate this case with No. 85 C 10362 are granted, as well as Jewel's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b). It is so ordered.

/s/ MARVIN E. ASPEN

Marvin E. Aspen
United States District Judge

DATED 8/12/86

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KELLY MERK, JOSEPH STASZEWSKI, VICKIE MENAGH, DONNA McCORMICK, DAVID THERKIELD, JOHN MALONE, MARLENE WAGNER, MICHAEL DEMARE, WAYNE VOLKER, ELEANORE COLLINS, ANDREW KACHIK, PATRICIA TODD, LINDA SINGLETON, and KEVIN QUAID, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., AMERICAN STORES COMPANY, INC., and UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 881, Charted by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO and CLC,

Defendants.

NO. 85 C 07876
Judge Aspen

MOTION TO DISMISS

Now comes the Defendant, JEWEL FOOD STORES DIVISION, JEWEL COMPANIES, INC., by its attorneys, Max G. Brittain Jr. and John J. Murphy, Jr., and moves this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this action in its entirety on the ground that the Second Amended Complaint fails to state a claim upon which relief can be granted. The Second Amended Complaint fails to state a claim in three respects:

(1) The collective bargaining agreement [Exhibit A to the Complaint] upon which Plaintiffs base this breach of

contract action contains an exclusive and mandatory grievance procedure for resolving "any dispute involving the interpretation or application of the provisions of the Contract." Nevertheless, Plaintiffs initiated this action for breach of that contract without attempting to exhaust the contractual grievance procedure.

(2) Under the provisions of the By-laws of UFCW Local 881, any Local 881 member who disagrees with the Local's disposition or settlement of his or her grievance may appeal said disposition to the Local Union Executive Council; any member who fails to so appeal is "deemed to have acquiesced in said disposition." [Article XV, Section F of Local 881 By-laws, attached as Exhibit A hereto] Plaintiffs have failed to attempt to exhaust their intraunion remedy prior to initiating this suit, and they should be deemed to have acquiesced in the prior disposition of their claim by Local 881.

(3) The dismissal with prejudice of the prior breach of contract suit brought by UFCW Local 881 on behalf of Plaintiffs and others (Case No. 84 C 7148) bars litigation of the instant action as *res judicata*. Plaintiffs are privies of Local 881 by virtue of their having invested Local 881 by contract (*i.e.*, the Local 881 By-laws) with "exclusive authority to interpret and enforce the collective bargaining contract . . . to withdraw grievances, settle and compromise grievances and decline to invoke the grievance procedures of a collective bargaining contract." [Article XV, Section A of Local 881 By-laws, attached as Exhibit A hereto.]

For each of the foregoing reasons, Defendant Jewel respectfully submits that the Second Amended Complaint should be dismissed.

Respectfully submitted,

JEWEL FOOD STORES DIVISION,
JEWEL COMPANIES, INC.

By: /s/ MAX G. BRITTAIN, JR.
Max G. Brittain, Jr.

/s/ JOHN J. MURPHY, JR.
John J. Murphy, Jr.
Its Attorneys

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APPENDIX A

BY-LAWS OF THE UNITED RETAIL WORKERS UNION LOCAL NO. 881 CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO, CLC

* * *

ARTICLE XV
APPEALS OF MEMBERS FROM LOCAL UNION'S DISPOSITION OF GRIEVANCES

SECTION A. The Local Union shall have the exclusive authority to interpret and enforce the collective bargaining contract. In accordance therewith, the Local Union shall have the exclusive authority to submit grievances to arbitration, withdraw grievances, settle and compromise grievances and decline to invoke the grievance procedures of a collective bargaining contract.

SECTION B. Any member who disagrees with the disposition of his or her grievance by the Local Union President, or the President's designated representative shall have the right to appeal the decision to the Local Union Executive Council. The appeal shall be submitted, in writing, to the office of the Local Union and shall contain a simple statement of the nature of the grievance and any other matter the member wishes to bring to the attention of the Executive Council.

SECTION C. The member shall submit the appeal within 15 days from the date the member is first advised of the Local Union's disposition of the member's grievance.

SECTION D. The Local Union Executive Council shall consider the appeal at the next regular meeting of the Executive Council. The Executive Council shall treat the appeal as either a request for a review or a request for reconsideration.

SECTION E. The Executive Council shall advise the member of its decision within 30 days from the date of its meeting. There shall be no further appeal from the decision of the Executive Council.

SECTION F. Any member who does not appeal the Local Union's disposition of the member's grievance as provided above shall be deemed to have acquiesced in said disposition.

DEFENDANT'S
EXHIBIT
A

APPENDIX C

29 U.S.C. 152 (3) (1982)

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.